87-1610

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JACK DYKSTRA FORD, INCORPORATED,
Petitioner,

VS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

28 USC Sec. 1738, enacted to implement the "Full Faith and Credit Clause" of the **UNITED STATES CONSTITUTION, Article IV, Section 1**, requires that State Court judicial proceedings (Judgments and Orders) must be given the same full faith, credit, and effect, in Federal Court proceedings, as they have, by law or usage, in the Courts of the State from which they are taken. In Michigan, by law and usage, the State Court Dismissal of May 3, 1985, dismissing *ALL* of the employment discrimation claims in question - both public and private - which identical claims were later sought to be asserted in Federal District Court, was a final Order of Dismissal, with prejudice, *on the merits*, and precluded any further proceedings in State Court to assert such claims against Petitioner.

Thus, the QUESTIONS PRESENTED are:

1. May a Federal Court nullify **28 USC Sec. 1738**, (as interpreted, and applied to Title VII actions in Federal Courts, by **Kremer v Chemical Construction Corp.**, 456 US 461 (1982), et. al.) that bars a later action by the Equal Employment Opportunity Commission ("EEOC"), in Federal Court, where an earlier action by a "deferral state's" Civil Rights Department in a State Court - on the SAME charge of discrimination, and SAME set of facts - was dismissed by the State Court, *on the merits*, by:

> **A.** Refusing to give full effect to that State's law that the dismissal *was on the merits*, and substituting its own determination that it was *not on the merits*, because it did not result from a fact determination following a fully-completed evidentiary presentation; and/or

B. By concluding that the EEOC is *not* bound, and precluded from further legal action, by the earlier dismissal, because it was not a named party there, even though the identical public and private interests that it has the right, and obligation, to represent, were adequately represented by the Michigan Department of Civil Rights, which has identical rights and obligations, as to the same dual interests, under virtually identical State law and procedures?

LIST OF PARTIES

The parties to the proceedings described below, and before this Court, are the Petitioner, JACK DYKSTRA FORD, INCORPORATED, a Michigan Corporation, and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Respondent. Petitioner has no parent companies, subsidiaries or affiliates to list, pursuant to Rule 28.1.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Jack Dykstra Ford, Incorporated, respectfully prays that a Writ of Certiorari issue: to review the Order of the United States Court of Appeals for the Sixth Circuit, entered on December 28, 1987, denying Petitioner's Petition for Permission to Appeal Under **28 USC 1292 (b)**; and, upon such review, to direct the Court of Appeals to grant said Petition, and reverse the District Court Opinion and Order of October 2, 1987. That Order denied Petitioner's Motion to Dismiss and/or for Summary Judgment of Dismissal of the pending civil Complaint by the Equal Employment Opportunity Commission ["EEOC"] (alleging employment discrimination against Petitioner) which Motion asserted, among other grounds, that such Complaint was precluded by the "Full Faith and Credit Act", **28 USC Sec. 1738.**

OPINIONS BELOW

The December 28, 1987 Order of the Court of Appeals for the Sixth Circuit, denying Petitioner's Petition for Permission to Appeal under **28 USC 1292 (b),** is reprinted in the APPENDIX, p 1a-3a infra.

The October 2, 1987, Opinion and Order, and November 5, 1987, Order on Rehearing and Reconsideration, issued by the United States District Court, Western District of Michigan, Southern Division (Bell, Robert Holmes, D.J.), reported at ___Fed Sup ___(1987), is reprinted in the APPENDIX, p 4a-11a infra.

JURISDICTION

Invoking federal jurisdiction under **Title VII** of the **Civil Rights Act of 1964**, Respondent—representing both *public*, and a particular individual's *private*, rights and inter-

ests against job discrimination —brought this suit in the United States District Court, Eastern District of Michigan, Northern Division. Venue was later transferred to the Western District of Michigan, Southern Division. On October 2, 1987, that Court denied Petitioner's Motion to Dismiss and/or for Summary Judgment, (SEE: APPENDIX, p 5a-11a infra). That Motion was based primarily on the ground that the EEOC's claims were barred by the preclusive/res judicata effect of an earlier Michigan State Court final Order of Dismissal, with prejudice, *on the merits*, of the same employment discriminaation claims (related to Petitioner's failure to hire Carol E. King as a sales person for Petitioner's automobile dealership in December, 1976), as are now again being pursued, in Federal Court. In the earlier State proceedings, the same claims and interests were pursued by the Michigan Department of Civil Rights ("MDCR"). And, the same occurrence, and set of facts, serves as the basis for both the current action, and the earlier action, dismissed on the merits by the State Court.

The District Court, on November 5, 1987, affirmed its October 2, 1987 Order, but added to it the determination that the controlling question of law in the matter contained substantial ground for difference of opinion, and that an immediate appeal from its Order might materially advance the ultimate termination of the case. (SEE: APPENDIX, p 4a, infra).

Petitioner then filed with the Court of Appeals for the Sixth Circuit its Petition for Permission to Appeal under **28 USC 1292 (b)**, which the Court of Appeals, on December 28, 1987, denied. (SEE: APPENDIX, p 1a-3a infra)

The jurisdiction of this Court to review the Order of the Sixth Circuit is invoked under **28 USC Sec. 1254 (1)**, and, **U.S. Supreme Court Rule 17.**

FEDERAL STATUTE INVOLVED

28 USC Sec. 1738—**State and Territorial statutes and judicial proceedings; full faith and credit.** * * * * The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

The present lawsuit by the EEOC arises out of a claim of employment discrimination filed by Carol E. King ("King"), with the MDCR (called a "Complaint" in Michigan, and a "Charge" by Federal Law), on February 2, 1977. Her claim is based on Petitioner's failure to hire her as a sales person with its automobile dealership. Originally, King claimed *sex* discrimination only. But that was later expanded, by MDCR, to include *race* as well. Under the "dual filing" concept, a copy of the Complaint was mailed to the EEOC, and "filed" there, as a "Charge". This is the only filing ever made regarding these claims of discrimination.

Michigan is a "deferral state" under **Section 706 of the Civil Rights Act of 1964, 42 USC Section 2000e**, et. seq. ("Title VII"). The MDCR is a so-called "706 Agency", to which the EEOC defers for the processing and enforcement of Federal, and State, anti-discrimination laws, the

elements of a claimed violation of Michigan law being virtually identical to the acts prohibited by Title VII. **29 CFR Sec 1601.13, (a), (4), (i), 1061.13 (b) (1),** and **1601.74.** Cooperative and work-sharing agreements have been entered into between EEOC and MDCR. EEOC has designated the MDCR as its "representative" for purposes of "investigative authority", pursuant to **29 CFR 1601.15,** and delegated the original investigative and "reasonable cause determination" functions to it. (SEE: Michigan's **Elliott-Larsen Civil Rights Act, MCL 37.2101 et. seq.; MSA 3.548 (101) et. seq.** and APPENDIX p 92a-112a infra).

Michigan's full panoply of Administrative and judicial procedures for the handling of such claims are extensive, surpassing those held in **Kremer**, supra., to satisfy minimum due process procedural requirements in order to make such procedures qualify for the full faith and credit guaranteed by Federal statute.

After investigating the Complaint, the MDCR concluded that there was "insufficient grounds" (not reasonable cause) to believe the discrimination claim was true, and, accordingly, refused to issue a "CHARGE" against Petitioner. King requested "reconsideration" of this action, and eventually the decision was reversed, and the filing of a "CHARGE" against Petitioner was authorized.

A formal "CHARGE" was then filed and served on Petitioner (captioned "MDCR, Ex Rel: CAROL KING, Claimant"). The relief sought there, under both Federal and State Constitutional and statutory provisions, to vindicate both public and private interests against employment discrimination, is identical to that sought here on behalf of the same dual interests.

Petitioner denied, as untrue, the claims of discrimination, and the matter proceeded to an adversarial, judicial-type evidentiary hearing on the merits before an MDCR Hearing Referee that commenced in late 1980, and "continued over many days of extensive testimony". (SEE:

APPENDIX, p 22a-23a infra). During the course of said evidentiary hearing, near the close of Claimant's proofs, the Hearing Referee dismissed the "Complaint" and "CHARGE", and underlying claims, without prejudice, because of MDCR's/Claimant's deliberate and repeated actions obstructing the orderly presentation and deliberation of the case, and including violations of the Hearing Referee's Orders granting Petitioner guaranteed discovery rights, essential in order to properly prepare the case. The Ingham County Circuit Court (Michigan's trial court of unlimited jurisdiction) entered an order affirming that dismissal. On appeal by the MDCR to the Michigan Court of Appeals, it entered its Decision and Order affirming the Circuit Court's Order, and with the direction that:

> "The claimant (Carol King) remains free to *renew proceedings* on her charge of discrimination. Defendant (MDCR, et. al.) has not been deprived of all opportunity to represent the Claimant, should the latter see fit to *initiate new proceedings.*" [Emphasis supplied] (SEE: APPENDIX, p 36a infra).

No appeal was taken from this Decision and Order. Though King, the MDCR and the EEOC each had the right, and power, to do so, none saw to it that a new "Complaint/Charge" was filed to "renew/initiate new proceedings". Despite that omission, the MDCR issued and served on Petitioner, a second IDENTICAL CHARGE. Petitioner demanded that it be dismissed because no new "Complaint/Charge" had been filed. When Respondent refused, the matter was again appealed to the Ingham County Circuit Court, and, after a Stipulation between the parties in that proceeding, the Court entered a final Order dismissing the second "CHARGE", and all further proceedings related thereto, and/or the underlying claims of discrimination, with prejudice, which, under Michigan law, operated as an adjudication on the merits. No effort to appeal that Order was ever taken.

A short time later, Petitioner received a letter from the EEOC indicating that it was now going to press these claims against Petitioner. Prompt contact between Petitioner's Attorney, and the EEOC's "Regional Attorney", Charles Taylor, led Petitioner to believe that, in compliance with their own Rule, and recognition of preclusion in such circumstances, the proceedings would be terminated. (SEE: APPENDIX, p 50a-54a, 57a-69a infra). While waiting for the confirmation of such termination and dismissal of the EEOC proceedings, Petitioner was served with a civil Complaint in Federal Court, the EEOC having commenced this action. Petitioner, believing such action to be absolutely barred by **28 USC SEC. 1738** (as well as on other grounds), moved the District Court to dismiss the action. It refused (SEE: APPENDIX, p 4a-11a infra), but ruled that the issue was a "very close question", and that its Order involved a controlling question of law, as to which there was a substantial ground for difference of opinion, and that an ultimate appeal from that Order might materially advance the termination of the litigation in question.

Petitioner then sought permission to appeal to the U. S. Court of Appeals for the Sixth Circuit, under **28 USC Sec. 1292 (b)**, which Petition was denied. (SEE: APPENDIX, p 1a-3a infra).

Because the refusal of the U. S. Court of Appeals, to take jurisdiction, and reverse the Order of the District Judge, clearly involves a clearly erroneous Decision of a Federal Court, in refusing to apply the Federal Full Faith and Credit Act, in conflict with Decisions of this Court, thereby causing a gross miscarriage of justice to Petitioner, this Petition is filed.

For a sequential, step-by-step itemization of the entire Administrative and judicial history of this case, in both State and Federal proceedings, to date (which were felt to be too voluminous to appropriately include here), Petitioner has included in its APPENDIX a "CHRONOL-

OGY OF EVENTS", to which the Court's attention is respectfully invited, if felt needed, for more specifics as to dates and particular factual details. SEE: APPENDIX p 115a infra).

REASONS FOR GRANTING THE PETITION

I.

Under the full faith and credit provisions of 28 USC Section 1738, a Federal District Court is not free to ignore state law, that a particular final court order of dismissal from that state is "*on the merits*", which precludes further action in state court on such claims, and substitute its own determination that such order is *not* on the merits, and thereby avoid having to give that order the same preclusive effect in Federal Court, as it would have in that State's Courts.

The "full faith and credit" principles are the bed-rock base of our Constitutionally-guaranteed system of federalism, clearly establishing the unique mutual relationship, and respective rights and duties, between our Federal and State governments. **28 USC Sec. 1738** was enacted to extend the Rule of **Article IV, Sec. 1** of the **UNITED STATES CONSTITUTION** to Federal Courts.

The singular importance of this principle is well-established.

> "As one of its first acts, Congress directed that all United States Courts afford the same full faith and credit to State Court Judgments that would apply in the State's own courts. . . 28 USC Sec. 1738.
>
> * * * * * *
>
> Section 1738 requires Federal Courts to give the

> same preclusive effect to State Court judgments that those judgments would be given in the courts of the State from which the judgments emerged.
>
> * * * * * *
>
> . . . (T)hese doctrines also serve to 'promote the comity between state and federal courts that has been recognized as the bulwark of the federal system."
>
> ***Kremer v Chemical Construction Corp.***, 456 US 461, 463, 466, Footnote 6 (1982)

The strength of this Rule has been expressly recognized in the context of Title VII actions.

> "Finally, the comity and federalism interests embodied in Section 1738 are not compromised by the application of res judicata and collateral estoppel in Title VII cases. Petitioner maintains that the Decision of the Court of Appeals will deter claimants from seeking state court review of their claims ultimately leading to a deterioration in the quality of the State Administrative process. On the contrary, stripping State Court Judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties, and for searching review by State officials. Depriving State Judgments of finality not only would violate basic tenets of comity and federalism * * * but also would reduce the incentive for States to work toward effective and meaningful anti-discrimination systems." ID, p 478.

Accordingly, to determine the preclusive effect that the final dismissal in this case must have in Federal Court, one must look to the law of the state from which the Order is taken, as to its effect there.

> "It has long been established that Section 1738 does not allow Federal Courts to employ their own rules of res judicata in determining the effect of State Judgments. Rather, it goes beyond the common law and commands a Federal Court to accept the rules chosen by the State from which the Judgment is taken."
>
> ID, p 481-482

SEE ALSO: ***Migra v Warren City School District Board of Education***, 465 US 75 (1984); ***Parsons Steel vs First Alabama Bank***, 474 US 518 (1986); ***Cemer v Marathon Oil Co.***, 583 F 2d 830 (6th Cir, 1978). The importance that the principle be applied *consistently* has frequently been underscored.

> "The Full Faith and Credit Clause like the Commerce Clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws, or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application."
>
> ***Magnolia Petroleum Co. v Hunt***, 320 US 430 (1944)

To the same effect, see: ***Johnson v Haley***, 357 Mich 411, 418-419; 98 NW 2d 555 (1959).

Without question, the State Court's Order of May 3, 1985 "dismissing, with prejudice" the very claims of discrimination now before this Court, and all "Complaints"/"Charges", pertaining to them, *was a final Order/adjudication on the merits*, even though it was not the result of a factual decision as to the sufficiency, or insufficiency, of proof of King's claims, based upon a fully-completed

evidentiary presentation and record. Nonetheless, under Michigan law, such an Order absolutely precludes the bringing of any other action, civil or criminal, based upon the same grievance, in the Michigan courts by the parties to that proceeding, or any others reasonably viewed as "in privity" with such parties. Michigan Court Rule 2.504 (A) (1), (B) (3); ***Dalton v Mertz,*** 197 Mich 390, 163 NW 912 (1917); ***Marquette v Fowlerville***, 114 Mich App 92, 98, 318 NW 2d, 618 (1982); ***Rose v Rose***, 10 Mich App 233, 157 NW 2d, 16 (1968); ***Irwin v Via***, 2 Mich App 375, 139 NW 2d, 893 (1966); ***Sloan v City of Madison Heights***, 425 Mich 288, 389 NW 2d 418 (1986); ***Howell v Vito's Trucking Co.***, 386 Mich 37, 191 NW 2d 313 (1971). (SEE: APPENDIX, p 8a infra).

The Rule is the same as to decisions of other Federal Courts, ***Kremer***, supra., p 482, and ***Cemer***, supra., [relying upon Rules 12 (b) (6) and 41 (b), Fed. R. Civ. P.].

This right of the several states to make the determination—binding on *all* other courts—concerning the *effect* that its final Orders and Judgments will have, is paramount in implementing the full faith and credit guarantees.

> "One of the strongest policies a court can have is that of determining the scope of its own Judgments."
> ***Cemer***, supra., p 831.

Unfortunately, here, as in ***Parsons Steel, Inc.***, supra., the Federal District Court:

> ". . . gave unwarrantedly short shrift to the important values of federalism and comity embodied in the full faith and credit act." ***Parsons***, supra., p 523.

The Court endeavored to avoid the mandate of the full faith and credit principle by substituting its own judgment, for that of the state as to whether or not the final State Court Order *should* be viewed as "on the merits", and,

therefore, entitled to preclusive effect in the Federal Court. It determined—in direct conflict with State Law—that it should *not* be so viewed. The Court accomplished this evasion by concluding that the dismissal was only "*constructively* on the merits". This *judicial amendment*, to an Act of Congress, the Court obviously had no power to do. Otherwise, the force of the full faith and credit Rule is effectively nullified, since each Court would be free to itself determine the *effect* which it will give another Court's final Orders, by looking behind the other jurisdiction's law governing such effect, and simply refusing to accept the rule of the Court issuing such order as to the effect it will have in that jurisdiction's Courts. The Full Faith and Credit Act will brook no such "nullification by interposition", and creative re-labeling, when its clear and simple language states that judicial proceedings will be given "the *same full* faith and credit (effect) . . . as they have by law or usage in the courts of" the jurisdiction from which they emanate. "*Full* credit" is not satisfied by: "partial" credit; or, as here, "NONE" at all.

This nation, though a bastion of liberty, recognizes that such liberty is guaranteed by adherence to a "rule of law"—not individual whim and caprice—and that this nation "confirm(s) . . . (its) liberty . . . in law". Otherwise, to paraphrase another book of laws: "In . . . (such a system) . . . there was no . . . (law in the land); every . . . (judge) did that which was right in his own eyes."

The force of the Full Faith and Credit Rule is such that a Court must give the same preclusive effect to a State Court Judgment, as the State Court would give it, even if the state law treating a particular Judgment as on the merits is felt to be unwise, or even when obviously based upon a clear mistake of law or fact. ***Parsons Steel***, supra.; ***Roche v McDonald***, 275 US 449 (1928); ***Cemer***, supra.; ***Hartmann v Time, Inc.***, 166 F 2d 127, (1947). Such Decisions recognize the strength of the Full Faith and Credit rule, and make it clear that Federal Courts simply cannot

yield to such a temptation to substitute their own judgment—for that of the Court issuing the Order—as to whether or not a State Court Order is "on the merits", but must continue to enforce such statutorily-directed "rule of law" and not a rule of caprice. In ***Cemer***, supra., the earlier Judgment of Dismissal was—in the vernacular of the Court in this case—only "*constructively* on the merits". Nonetheless, it had to be given full preclusive effect under the Full Faith and Credit Rule.

Further, Respondent has adopted its own, self-imposed, binding *Administrative Rule*, in candid and proper recognition of this clear, legal principle, namely: (1) a State Court Dimissal, even without a final decision, on the facts after a full evidentiary presentation (i.e., only "construcitvely" on the merits) must nonetheless be treated as a disposition "on the merits", i.e., one that must be given *full* faith and credit in Federal Court, to bar a subsequent action there, *if* so treated by the State of issuance; and, (2) Federal Judges cannot substitute their own judgment on this issue for the law of the State rendering such a final disposition. (SEE: APPENDIX, p 76a-77a, 50a-54a, 57a-59a, 62a-69a infra) where Respondent's "Rule", and its "Regional Attorney's" acknowledgement of it, are set forth).

Whether this excerpt from Respondent's own set of Administrative Rules is viewed as: (1) a self-imposed Administrative Rule—barring this suit—fully binding on it under the principle of ***Service v Dullas,*** 354 US 363 (1957) and ***Vitarelli v Seaton***, 359 US 335 (1959); or (2) merely a binding admission, or candid recognition of, the above-described law, it is manifest that this case must be dismissed, based upon the preclusive effect of the State Court dismissal, since, without any honest argument, in the words of Respondent's own Rule:

> "... The Judgment would be given preclusive effect under the law of the State from which the Judgment emerged."

Commission Decision No. 85-14-CCH Employment Practices Guide, Paragraph 6855

* * * * * *

"... State law must always be examined to determine whether the decision would be considered a final one on the merits and whether that decision would be given preclusive effect."
(SEE: APPENDIX, p 76a infra).

Petitioner anticipates that Respondent will attempt to characterize the final State Court Dismissal as being based upon "untimely filing" of a Complaint, and, therefore "not *really* on the merits". Either King, MDCR or EEOC had the right to re-file a Complaint after the first State Court dismissal, i.e., "renew proceedings/initiate new proceedings" on King's charge of discrimination against Petitioner; but, none of them chose to take such action, in order to pursue the State process any further, even though any one of them had the power to do so. ***Mohasco v Silver***, 447 US 807, 100 S Ct 2486; ***Love v Pullman Co.*, 404 US 552, 925 S Ct 616;** EEOC and MDCR *Administrative Rules*. If such a new "Complaint"/"Charge" had been refiled, after the first dismissal, it would have been timely, and would have permitted the case to continue to full evidentiary presentation and factual disposition in Michigan. Since the parties having the right to do so chose *not* to renew such proceedings, the State Administrative, and judicial, processes terminated. The significant reason behind the first dismissal, reaffirmed in the second, was to preserve the integrity of the administrative and judicial process, by not permitting a party to deliberately ignore and violate the repeated direct orders of the Hearing Officer to give the other party its guaranteed rights of discovery. However, even if the second/final dismissal on the merits could properly be viewed as based upon the lack of "timely Complaint", it has been held that such a dis-

missal is, nonetheless, on the merits, and, therefore, a bar to this action.

> "However, a decision dismissing an action on the ground that no charge was ever timely filed is *final*. Several theories for this result have been given, including that ... the *dismissal* of the previous case on this ground *is on the merits*, rather than on jurisdictional grounds (Jones v Bell Helicopter Co. [1980 CA5 Tex] 614 F 2d 1389, 22 BNA FEP Cas 773, 22 CCH EPD Para 30817, 29 FR Serv 2d 682)." [Emphasis Supplied
>
> 45B AM JUR 2D; "Job Discrimination", Sec. 1772, p 227.

SEE ALSO: Page 10, Judge Engel's Dissent, ***Maurya v Peabody Coal Co.***, (Sixth Circuit Decision, Docket #86-5450) (SEE: APPENDIX, p 82a-91a infra).

Further, Petitioner anticipates that Respondent may try to avoid the preclusive effect of the earlier State Court dismissal by suggesting that Title VII claims could not have been asserted in the State proceedings because Federal Courts have *exclusive jurisdiction* thereof. There is a *conflict* among the Federal circuits on this issue, which this Court has not yet expressly resolved, thereby furnishing additional reason for granting this Petition. **45B AM JUR 2d, "Job Discrimination", Sec. 1742, p 200.**

With regard to claims under 42 USC Sec. 1983 (which the Court, in *Kremer*, supra., held presented *more* of a reason to suggest an implied repeal of 28 USC Sec. 1738 than what was found in Title VII) this Court concluded in ***Migra***, supra., that Federal Courts did *not* have exclusive jurisdiction for such Section 1983 claims. It appears that such reasoning would be equally relevant here.

> "That statute (28 USC Sec. 1738) embodies the view that it is more important to give full faith

> and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.
>
> In the present litigation, *petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court.*" [Emphasis Supplied] ***Migra***, supra, pp 84-85.

Whether or not an action in a Michigan State Court could expressly rely upon Title VII, as well as the **U. S. CONSTITUTION**, and State Constitutional provisions and Civil Rights laws, that are almost identical to the Federal Act in terms of protections granted and procedures available (which it is likely that Michigan's Supreme Court would rule could be done, in view of its ruling that **Section 1983** actions may be pursued in State Courts), it is obvious that the allegedly discriminatory acts in question here—just as pointed out in ***Kremer***, supra., and used there for a basis for its ruling of preclusion:

> ". . . are prohibited by both federal and state law. The elements of a successful employment discrimination claim are virtually identical."
> ID, p 479.

Thus, whether or not the State proceeding could legally be specifically premised upon the Federal Act, as it expressly purported to be here, (SEE: APPENDIX p 18a, 37a, infra) is irrelevant to this issue, because it is clear that (as discussed in section II below), the same public and private rights and interests are given as much protection under the Michigan Civil Rights Statute and procedures as they are under Federal law. Accordingly, there is such an identity of parties and interests involved in both actions, under both sets of laws, that absolutely no rational

basis exists for creating an exception to the preclusive effect of the prior State Court adjudication required by the Full Faith and Credit Act.

II.

While technically not a named "party" to the state proceedings pursued by MDCR on the basis of King's claims of employment discrimination, the EEOC must reasonably be viewed as in privity therewith, and, therefore, fully bound by such proceedings, where: the claims arise out of the same set of facts; the same public and private rights and interests are sought to be protected in both actions; virtually identical elements are necessary to establish discrimination under State law and Title VII; the State Administrative and judicial proceedings available meet due process standards; and the relief sought is identical.

In addition to attempting to avoid the preclusive effect of the State Court dismissal required by the Full Faith and Credit Rule, by characterizing the State Court action as *not really* "on the merits", the lower court also used langauge raising questions as to whether or not the EEOC could, consistent with procedural due process principles, be bound by such State Court action, because it was technically not a named party there, and, therefore, the interests it was authorized to pursue may not have been adequately represented there. The District Judge acknowledged that these issues did constitute "very close questions", and so certified regarding such substantial ground for difference of opinion.

The language of the District Judge which raises the issues framed in this question is found in the final two paragraphs of the "RES JUDICATA"section of his Opinion and Order. (SEE: APPENDIX, p 9a infra).

In the earlier State proceedings, and the instant Federal Court action, it is beyond doubt that:

1. The basic public and private rights and interests, against the harmful effects of job discrimination, sought to be asserted and protected, are identical.
2. The claims of discrimination, sex and race, are identical.
3. The claims arose out of the same set of facts.
4. The same Federal and State Constitutional, and statutory, provisions are relied upon; and the procedures available are comparable, and satisfy due process.
5. The same private individual is involved.
6. The same evidence will be relied upon.
7. The relief sought is identical.

Neither Congress, nor prior case law, permit the maintenance of a Title VII action, following a *final* State Court dismissal *on the merits*, of an action by a State anti-discrimination agency, under Federal and State law, where the relief sought is identical. *Kremer*, supra., settled this issue, when it held that:

> "Title VII . . . (did not) supersede the principles of comity and repose embodied in Section 1738."
> ID, p 463

Title VII claims are barred where there is a State Court final Judgment or Order:

> ". . . dealing with a state statutory right, subject to state enforcement in a manner expressly provided for by the Federal Act."
> ID, p 478

Because of the absolute identity of interests, issues, facts, relief sought and other elements listed above, in both the Federal and the State actions, no distinction can legitimately be made based upon the technical difference in the

nominal representative "party" maintaining the State and Federal claims.

Both the EEOC and MDCR have the right and obligation to vindicate both public and private rights and interests. The earlier State proceedings asked for relief for the private individual, *and* that Petitioner be enjoined from further discrimination against others in her class. In ***General Telephone Co. v EEOC***, 446 US 13 (1980), this Court ruled that the purpose of Title VII, and the 1972 Amendments, was "to implement the public interest as well as to bring about more effective enforcement of private rights". ID, p 326. Thus, the thing that is important is certainly ***not*** that *each* governmental agency has the right to carry an employment discrimination action through to conclusion, to vindicate the common public and private interests that they both are obligated to serve and represent. Nor, is it important *which* agency has the opportunity to act in such dual representative capacity. What is important is that at least one or the other has had the opportunity to attempt to vindicate the dual interests involved, in a jurisdiction where procedural due process standards have been met. Unarguably, those interests have been met in this case. It is clear, under the statutory scheme contemplated by Title VII, as construed in ***Kremer***, supra., that "deferral states" are given the first right to resolve employment discrimination claims. And, in such a State—in which guaranteed procedures available do satisfy due process; the elements of a successful claim are identical to the Federal scheme; and, identical relief is sought, for both private and public interests—where the State proceedings resulted in a Court action that dismissed such proceedings, on the merits, the Full Faith and Credit Act prohibits that same employment discrimination claim being relitigated later by the EEOC in Federal Court. It is inherent in this statutory framework that the EEOC and the MDCR, in a "deferral state", where such criteria are

met, are "in privity" for purposes of the Full Faith and Credit preclusion rule.

This Court, in ***Kremer***, supra., concluded that the legislative debate surrounding the initial passage of Title VII in 1964, and the substantial amendment adopted in 1972, plainly disclosed that Congress did not intend to override the historic respect that Federal Courts accord State Court Judgments in such cases. The Court, on pages 474 (Footnote 14) through 476, quoted the incisive comments from Senators Dirksen, Hruska, Javits and Williams, and concluded:

> "Nothing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in Federal Court an issuer esolved by a State Court. While striving to craft an optimal niche for the States in the overall enforcement scheme, the Legislators did not envision full litigation of a single claim in both State and Federal forums."
> ID, p 473

For additional authority for the application of this salutary principle, to preclude successive actions in this particular kind of representative protection of both public, and private, rights and interests, the following are significant. In the context of successive actions by an allegedly discriminated-against job applicant, first under State law, and thereafter under Title VII, the Court in ***Santos v Todd Pacific Shipyards Corp.***, (1984 C.D. Cal) 585 F Sup 482, held that, since the State Court action, and the Federal Court action, involved *the same primary rights*—the right to be free from discrimination in the work place—and the State and Federal laws and procedures were virtually identical, the earlier State-Court dismissal barred the later Federal Court action. That is precisely the situation presented here.

In the context of successive actions by governmental agencies representing both the interests of private individuals, and the public, and in understanding the rule of "preclusion", in such cases where governmental agencies act in such a *dual representative capacity* (i.e., on behalf of one or more *persons* in a protected class, *and* on behalf of the *public* interest in seeing to it that the protected class is given the rights it is entitled to) ***Nevada v United States***, 463 US 110 (1983) is very helpful. In that case, the earlier adjudication was held to be binding even upon "non-parties" ("mutuality of estoppel" was not required). The Court expressly pointed out that the fact that governmental agencies operate in a dual capacity, representing both individual and public interests, did not prevent the application of the rule of preclusion where, in honest, practical effect, the interests represented in both actions were essentially the same.

The parties involved in the two actions there were clearly *not* "parties" or "privies" in the technical, classical, "horn book law of civil judgments" sense. In fact, this Court there expressly cautioned against such overly-simplistic efforts to make such "horn book" rules fit cases where governmental agencies act in a representative capacity for private individuals, as well as in pursuit of societal interests deriving from such individual rights.

> ". . . it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other (public) interests as well.
>
> * * * * * *
>
> With these observations in mind, we turn to the principles of res judicata that we think are involved in this case.
>
> * * * * * *
>
> **Footnote 15:** * * * * We have already said that

> the Government stands in a different position than a private fiduciary where Congress has decreed that the Government must represent more than one interest. When the Government performs such duties it does not by that reason alone compromise its obligation to any of the interests involved.
>
> * * * * * *
>
> But, as we have indicated previously, we do not believe that this analogy from the world of private law may be bodily transposed to the present situation.
>
> * * * * * *
>
> As we previously intimated, we think the Court of Appeals' reasoning here runs aground because the Government is simply not in the position of a private litigant or a private party under traditional rules of common law or statute. Our cases make this plain in numerous areas of the law." ***Nevada***, supra, pp 128, 132, 141

In light of the Decisions in ***Nevada***, supra., and ***Kremer***, supra., facile reference to, and blind, unthoughtful reliance on, "horn book law of judgments", applicable to individual civil suits for damages, simply will not suffice. It is respectfully submitted that ***Nevada***, supra., ***Migra***, supra., and ***Kremer***, supra., have, in the context of Federal/State job discrimination claims, articulated a preclusion rule specifically applicable to such Title VII cases namely: where there has been a prior State Court adjudication on the merits, in a case where both the private and public interests have been represented, which, under that State's law, would preclude further action on that same claim of discrimination in that State's Courts, that regardless of what terminology is used to express the rule of preclusion/ res judicata, a subsequent Title VII action by the EEOC

is prohibited. Irrespective of the legal doctrine, or terminology used, i.e., whether viewed as "res judicata", "collateral estoppel", "direct estoppel", "issue preclusion", "claim preclusion", or, "merger and bar", the Full Faith and Credit requirements of Section 1738, as elucidated in ***Kremer***, supra., and ***Migra***, supra., the rule of preclusion applicable here, has been set forth in these *inescapably controlling words* from ***Kremer***, supra., set forth in the APPENDIX, p 113a infra.

The same issue of employment discrimination, arising from the same set of events, and involving the same parties, and interests, that was dismissed on the merits in State Court, cannot be relitigated in Federal Court.

Michigan law is in accord: ***Howell v Vito's Trucking***, supra., ***Sloan v City of Madison Heights***, supra., ***Knowlton v City of Port Huron***, 355 Mich 448; 94 NW 2d 824 (1959), and ***Johnson v Haley***, supra. These Decisions make it clear that where there is *substantial identity* between the respective interests in the two actions, even though there is not absolute technical identity of nominal parties, the parties in the two cases must be viewed as "in privity", and, therefore, bound by the earlier adjudication. SEE ALSO: **46 AM JUR 2d, "Judgments"**, Sec. 406 - 414, pp 574-581; **46 B AM JUR 2d, "Job Discrimination"**, Sec. 1771 - 1777, 1781, p 225 - 233, 237 - 239.

In ***Howell v Vito's Trucking***, supra., the significant part of the ruling is found in the following:

> "These rules (holding that res judicata does not apply) have been denied application, however, where a party to one action in his individual capacity and to another action in his representative capacity is in each case asserting or protecting his individual rights."
> ***Howell***, supra., p ___

In ***Sloan v City of Madison Heights***, supra., the Court ruled that if the interests of a named party (i.e., a union)

in a later suit, had been brought before the Court for consideration in the earlier suit—though that party was not a named party in the prior suit brought by one of the union members—it would nontheless be bound by the adjudication in the earlier suit, since its interests would have been adequately presented and represented there. The definition of "privity" adopted there is applicable here.

> "In its broadest sense, *privity* has been defined as . . . such an *identification of interest* of one person with another *as to represent the same legal right.*" [Emphasis supplied]
> ***ID***, p 295

It is clear that, here, the *same rights are being asserted and protected*, in both cases, and that there is "such an identification of (the) interest" of the EEOC, with the MDCR, and King—both agencies acting for both public interest, and on behalf of the allegedly aggrieved private party—"as to represent the same legal right(s)".

Here, just as in **Kremer**, supra, pp 479-480, the State anti-discrimination law, and administrative and judicial procedures available to an allegedly aggrieved party, are *adequate*, i.e., at least as broad and protective—if not more so—as the Federal Act, in their concern with an individual's rights to be protected against discrimination in the work-place. (SEE: **Michigan Constitution 1963, Article I, Sec. 2, and Article V, Section 29; MCL 37.2101, et. seq.; MSA 3.548 (101) et. seq.**; MDCR Rules, at p 92a-112a APPENDIX, infra) The District Court's expressions of concern regarding the limitations of due process on the preclusive effect of a prior State Court dismissal, under the Full Faith and Credit Act, and the paired concern of the EEOC not having had a chance to have *its* "day in court", are not borne out by the facts and circumstances of this case.

In ***Kremer***, supra., this Court considered the claim that the State Court actions did not bar Kremer's Title VII

claim "because the procedures provided were inadequate", an issue essentially identical to the concern expressed by the District Court here. All that is required is:

> ". . .that the first adjudication offer and full and fair opportunity to litigate. But, where we are bound by the statutory directive of Section 1738, State proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the Full Faith and Credit guaranteed by Federal law.
>
> * * * * * * *
>
> We have no hesitation in concluding that this panoply of procedures, complemented by administrative well as juducial review, is sufficient under the Due Process Clause. * * * * The fact that Mr. Kremer failed to avail himself of the full procedures provided by State law does not constitute a sign of their inadequacy."
> ID, pp 481, 484

Clearly, the Michigan anti-discrimination statutes, and procedures, satisfy the applicable requirements of due process. The recognition of Michigan as a "deferral state", and MDCR as a so-called "706 Agency", and the cooperative and work-sharing agreements actually entered into between EEOC and MDCR, in which the EEOC has designated MDCR as its "representative" for purposes of "investigative authority", pursuant to 29 CFR Sec. 1601.15, and delegated the original investigative and "reasonable cause determination" function to the MDCR is further abundant proof of the recognized adequacy of the State process.

To this, must also be added the extremely significant fact, as mentioned earlier, that the EEOC, as well as King, and/or the MDCR, had the absolute right to refile, and

pursue, in the State proceedings, a new "Complaint/ Charge", (i.e., "to renew proceedings, initiate new proceedings" on the Charge of discrimination in question). Thus, the EEOC had it within its power to have reactivated the State proceedings, so that the evidentiary hearing could have gone to a full completion, and so as to be able to have its interests and concerns, as well as those of King, pursued through its State agency for the protection of such Federal and State employment discrimination rights. Since it had such right, power and opportunity, due process does not prevent it from being bound by the final judicial disposition of the matter in State court, merely because "it failed to avail itself of the full procedures provided".

In addition, the following factors create an elaborate, extensive, cooperative interrelationship between the EEOC and the MDCR that demonstrates the existence of the necessary "agency/privity" relationship needed to bind the EEOC though not a named party in the earlier proceeding:

(1.) The **29 CFR Sec. 1601.13 (a) (4) (i), 1061.13 (b) (1), 1601.74** determination and designation by EEOC of MDCR as a so-called "706 Agency" to which EEOC "defers" for all preliminary—and, often times, final—processing and determinations of Michigan Civil Rights **Complaints.**

(2.) The cooperative agreements authorized by **29 CFR 1601.13 (c)** between EEOC and MDCR "to establish effective and integrated resolution procedures (including) . . . cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the 706 Agency. . . ".

(3.) The actual "worksharing agreement between MDCR and the (EEOC)", acknowledged by Respondent.

(4.) The mutually-cooperative and beneficial acts that each party to this "work sharing" agreement actually performed on behalf of the other, such as:

(a) MDCR's mailing of a copy of the Complaint to EEOC;

(b) EEOC's delegating to MDCR the original investigative and "reasonable cause determination" functions;

(5.) The Rule-made designation, by EEOC of MDCR, as its "representative" for purposes of "Investigative Authority", pursuant to **29 CFR 1601.15.**

Under all of these circumstances, the EEOC must realistically be viewed as "in privity" with the MDCR.

CONCLUSION

The special and important reasons that the Court should take this case, at this time, reverse the clearly erroneous Decision of the lower courts, and thereby rectify the gross miscarriage of justice that will result if this is not done, are these:

1. The rulings are in clear violation of a major Federal statute, 28 USC 1738, involving the important Full Faith and Credit principles derived from Constitutional mandate, implicating the extremely significant principles of comity and federalism.

2. The District Court has clearly misconstrued, misinterpreted, misapplied and misconceived a directly applicable, and totally dispositive, Supreme Court Decision, ***Kremer***, supra., in this extremely important area of employment discrimination law, as to which issue the Courts of Appeal are divided, and in confusion.

3. The issue arises in an important area of Federal law, involving employment discrimination. And, because of the dual track (Federal and State) enforcement system created, there is frequent and abundant opportunity for confusion, and conflict between the Court's of Appeals, from

the very type of situation that arises here, with attempts to relitigate, in a second jurisdiction, that which has been finally disposed of, on the merits, in the other jurisdiction. Thus, it is apparent that, for predictability, stability and necessary guidance of bench and bar, in such very active field of Civil Rights litigation, further clarification is necessary from this Court, for uniformity and fairness of treatment, by clarifying the application of ***Kremer***, supra., even further, and also thereby limiting the number of cases in this area that must be brought before the Courts of Appeal, and this Court, on this issue for final resolution. In view of this rampant, wide-spread confusion, providing fertile ground for contradictory lower Court rulings, and thus inviting numerous further appeals, the Court obviously needs to take this case so as to "make it (i.e., the rule of preclusion here, so) plain . . . that even (s)he who runs may read it."

4. Such cases come before this Court with great frequency as demonstrated in nearly every "Advance Sheet" issued in recent years.

5. The issue is a pure legal issue which will dispose of the case, without Petitioner being subjected to the further gross miscarriage of justice that will result from the substantial additional expense of such a relitigation, even though successful, that: (a) is likely to bankrupt the corporation, with the later "absolution", by yet another dismissal, being too late to prevent the irreparable harm of such a financial disaster, ["one more such *victory*, and we are *lost*"] (***Sampson v Murrary***, 415 US 61, 95, 101 - 102 [1974]); and, (b) at a time so long after the fact (over eleven years later) that Petitioner will be severely prejudiced, and handicapped, in defending itself against the claim, because of unavailability of witnesses, loss and destruction of documentary evidence, and the erosion of available witnesses' memories.

For all the reasons stated, this Petition should be granted, so that after full review the clearly erroneous Decisions of the lower courts can be reversed, the pending Complaint be dismissed, under Full Faith and Credit principles, and this decade-long hegira finally brought to an end.

CARR, STREET & GRUA

BY: /s/CASSIUS E. STREET, JR.
CASSIUS E. STREET, JR. P.21087
Counsel of Record for Petitoner
BUSINESS ADDRESS:
2401 E. Grand River Ave.
Lansing, Mich. 48912
PHONE: 1-517-487-8300

Dated: This 25 day of March, A.D., 1988.

APPENDIX

APPENDIX

INDEX

ITEM #: DESCRIPTION:

prejudice" Charge No. 1 (Item #7 above), and Complaint/ Charge of February 2, 1977 (Item #4), and underlying allegations of discrimination by Carol King against Defendant.

11. State of Michigan, Court of Appeals' **Decision/Opinion/Order**, dated **June 3, 1983**, affirming Circuit Court Dismissal (Item 10).

12. "CHARGE" (No. 2), dated **July 12, 1983**, (identical to "CHARGE" No. 1, Item #7 above) filed by MDCR, "ex rel Carol King, Claimant", against (served on) Petitioner ("Respondent" therein).

13. Stipulation of **May 1, 1985**, filed in State of Michigan, Ingham County Circuit Court proceeding between Petitioner here (as "Plaintiff/Petitioner" there) and MDCR, the individual members of MCRC, and Dianne Rubin (Assistant Michigan Attorney General) (as "Defendants"/ "Respondents" there), for entry of a ***Final Order*** permanently dismissing, with prejudice (on the merits) CHARGE No. 2, any and all Complaints or proceedings relating thereto, and the underlying claims of discrimination.

14. Final Order of State of Michigan, Ingham County Circuit Court, dated **May 3, 1985**, permanently "dismissing, and terminating with prejudice", "CHARGE" No. 2, and "all further proceedings related to said Complaint, "CHARGE", and/or claims of discrimination against. . . " Petitioner.

15. EEOC's first so-called **"Determination" letter**, dated **April 12, 17, 1985** (later retracted/rescinded) addressed to King and Petitioner.

16. Letter of **April 19, 1985**, from Petitioner's attorney, to EEOC's "Regional Attorney", Charles Taylor.

17. EEOC's **letter** of **May 9, 1985**, to King and Petitioner, "rescinding" "Determination letter" of April 12, 17, 1985 (Item #15 above).

18. **Letter** of **May 20, 1985**, from Petitioner's attorney to EEOC's "Regional Attorney", Charles Taylor.

19. **Letter** of **June 11, 1985** from Petitioner's attorney to EEOC's "Regional Attorney", Charles Taylor.

20. **Letter** of **July 12, 1985** from Petitioner's attorney to EEOC's "Regional Attorney", Charles Taylor.

21. **Letter** of **September 9, 1985,** from Petitioner's attorney to EEOC's "Regional Attorney", Charles Taylor, enclosing/filing with EEOC, "Request and Notice" also filed with MDCR.

22. EEOC's second so-called **"Determination letter"**, dated **January 28, 1986**, to King and Petitioner.

23. EEOC's Federal District Court Civil Action **Complaint** against Petitioner, dated **September 30, 1986.**

24. Page from EEOC's **Agency Rules** regarding preclusive effect of "STATE COURT ACTION DISMISSED WITH NO DECISION ON THE MERITS".

25. **Affidavit of Cassius E. Street, Jr.** of **October 13, 1987**, in support of Petitioner's Motion for Rehearing as to District Court's Opinion and Order of October 2, 1987, denying Petitioner's Motion to Dimiss/For Summary Judgment (Item #3 above).

26. Copy of ***Maurya v Peabody Coal Co.***, ___ F 2d ___ (6th Cir. 1987), No. 86-5450).

27. Copy of Michigan Civil Rights Commission and Michigan Department of Civil Rights **RULES.**

28. Controlling portion of ***Kremer v Chemical Construction Corp.***, 456 US 461, Footnote 6 pp 466-467; Footnote 22, pp 481-482.

29. ***CHRONOLOGY OF EVENTS***

APPENDIX ITEM #1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

December 28, 1987

RECEIVED
DEC 29 1987

Remo Mark Grua
Cassius E. Street
CARR, STREET & GRUA
2401 E. Grand River Avenue
Lansing, Michigan 48912

RE: 87-8035 Jack Dykstra Ford, Inc.
v. Equal Employment Opportunity
Commission; D.C. #G87-33/Bell

Dear Counsel:

Enclosed is a copy of an order which was entered today.

Yours very truly,
JOHN P. HEHMAN, CLERK

/s/ Tom Bennignus
Tom Bennignus, Deputy

Encl.
CC: Mimi M. Gendreau

No. 87-8035

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Jack Dykstra Ford, Inc.,	)
	)
Petitioner,	)
	)
	)
v.	)
	)ORDER
	)
Equal Employment Opportunity Commission,	)
	)
	)
Respondent.	)
	)
	)

RECEIVED
DEC 29 1987

BEFORE: JONES, WELLFORD and BOGGS, Circuit Judges.

Petitioner Jack Dykstra Ford, Inc. petitions this Court for permission to appeal, pursuant to 28 U.S.C. §1292(b), the district court's order of October 2, 1987, as affirmed and amended on November 5, 1987. The respondent Equal Employment Opportunity Commission has responded in opposition.

The district court denied petitioner's motion to dismiss and motion for summary judgment which asserted that respondent's suit for race and sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1982), was barred by a prior state court judgment. The

district court subsequently amended the order to include the statement prescribed by 28 U.S.C. §1292(b).

Review under §1292(b) should be sparingly granted and then only in exceptional cases. *In re April 1977 Grand Jury Subpoenas,* 584 F.2d 1366, 1369 (6th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 934 (1979); *Kraus v. Board of County Road Comm'rs,* 364 F.2d 919, 922 (6th Cir. 1966). Upon consideration of the petition and response, the Court concludes that interlocutory review under 28 U.S.C. §1292(b) is not appropriate. *Cardwell v. Chesapeake & Ohio Ry. Co.,* 504 F.2d 444, 446 (6th Cir. 1974).

It is ORDERED that the petition for permission to appeal pursuant to 28 U.S.C. §1292(b) is denied.

ENTERED BY ORDER OF THE COURT

/s/ ?????
Clerk

APPENDIX ITEM #2

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, File No. G87-33-CA5

-VS- HON. ROBERT HOLMES BELL

JACK DYKSTRA FORD, INC.,

Defendant.

ORDER ON REHEARING AND RECONSIDERATION

This Court having reviewed its Opinion and Order of October 2, 1987, reviewed briefs and listened to oral arguments concerning reconsideration thereof, hereby affirms its October 2, 1987 order for the reasons stated therein with the following addition:

> That this Court concludes the controlling question of law in this matter contains substantial ground for difference of opinion and an immediate appeal from the order of October 2, 1987 may materially advance the ultimate termination of this case.

IT IS SO ORDERED.

Dated: November 5, 1987 /s/ Robert Holmes Bell

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX ITEM #3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, File No. G87-33-CA

-VS- HON. ROBERT HOLMES BELL

JACK DYKSTRA FORD, INC.,

Defendant.

FILED
1987 OCT - 2 PM 4:48

OPINION AND ORDER OF THE COURT

Defendant, Jack Dykstra Ford, Inc. (hereinafter Dykstra), moves for dismissal and/or summary judgment on the Equal Employment Opportunity Commission's (hereinafter EEOC) action claim that Dykstra committed and continues to commit unlawful employment practices in violation of 42 U.S.C. § 2000e-2(a)(1), specifically failing to hire a black, female applicant, Carol King, because of her race and gender.

The EEOC's present claim arises out of a complaint filed over ten years ago. Carol King, a black female, applied for a sales position with Jack Dykstra Ford, Inc. on December 15, 1976. The defendant, Dykstra, learned that King had received extended unemployment benefits and on January 24, 1977 Dykstra notified King that it would not hire her. Investigation revealed that Dykstra hired white males who had also received extended unemployment benefits.

On February 2, 1977, King filed a complaint with the Michigan Department of Civil Rights (hereinafter MDCR). In compliance with dual filing procedures (EEOC Procedural Rules §1601.13(b)(1)) the MDCR mailed King's complaint to the EEOC, which received the complaint on February 15, 1977.

The MDCR processed and investigated the complaint and charged Dykstra with unlawful employment discrimination on April 8, 1980. At the administrative hearing the hearing referee ordered the assistant attorney general representing the MDCR to produce a MDCR conciliator/investigator. The assistant attorney general refused claiming a privilege under the Michigan Civil Rights Commission Rule 37.5(a). As a sanction for refusing to comply, the hearing referee dismissed the MDCR's April 8, 1980 charge pursuant to Michigan General Court Rule 313.2 (current version at Michigan Court Rule 2.313(b)). The hearing referee dismissed the case as a discovery sanction before deciding the merits of the discrimination claim.

Defendant Dykstra sought a writ of superintending control ordering the MDCR to enter a final order dismissing the complaint/charge without prejudice. On November 12, 1981, the Ingham County Circuit Court (Brown, J.) granted the request. The MDCR appealed to the Michigan Court of Appeals, which affirmed the trial court's decision on June 3, 1983.

On July 12, 1983 the MDCR issued a new discrimination charge against Dykstra. On May 1, 1985 the MDCR and Dykstra agreed to a dismissal with prejudice of the July 12, 1983 charge because King had not filed a fresh com-

plaint on which the MDCR could act. The Ingham County Circuit Court issued a Writ of Superintending Control embodying the parties' stipulation dismissing the charge on May 3, 1985.

In 1985, eight years after the alleged discrimination, the EEOC began processing King's complaint upon notification from the MDCR of its final action on the case. On January 24, 1986, the EEOC issued its reasonable cause determination and sought conciliation. On September 30, 1986, the EEOC filed its complaint, other resolution of the complaint failing. On February 2, 1987, Dykstra filed the present motion.

JURISDICTION

Defendant Dykstra argues that the EEOC has no jurisdiction or authority under 42 U.S.C. §2000e-5(c) and (e) to bringing this action because King never properly filed a timely complaint with the EEOC.

42 U.S.C. §2000(e)-5(c) and (3) provide that where a party seeks relief under state law for unlawful employment practices the party may not file a complaint with the EEOC for 60 days after initiating the state action or 300 days after the alleged violation or 30 days after the termination of the state action.

Case law interpreting these filing requirements articulate a "suspended animation" theory. An early filing with the EEOC during the 60 day period exclusively reserved for state action is held in abeyance until the 61st day or termination of the state action and then is "automatically filed" with the EEOC. The EEOC defers to state action and promotes state resolution of unlawful employment claims. *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980); *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (1972).

In the present case the EEOC received King's complaint from the MDCR on February 15, 1977 pursuant to the

EEOC's dual filing procedure. Under *Mohasco, supra,* and *Love, supra,* King's complaint was automatically filed 61 days after King's filing with the MDCR.

RES JUDICATA

Dykstra claims that the EEOC's claim is barred by the doctrine of res judicata. Dykstra notes that the MDCR's second charge of July 12, 1983 was dismissed with prejudice. Under Michigan Court Rule 2.504(b)(3) a dismissal with prejudice "operates as an adjudication on the merits." *Marquette* v. *Fowlerville,* 114 Mich. App. 92, 98; 318 N.W. 2d 618 (1982).

Dykstra reasons that since the second dismissal was constructively on the merits the claim is barred from further litigation under state law. Dykstra further argues that federal courts are required to accord the same preclusive effect to former state court adjudications as would the state courts themselves. *Kremer* v. *Chemical Construction Co.,* 456 U.S. 461, 466 (1982). Since the EEOC's present claim is essentially the same claim as brought by the MDCR and it was dismissed with constructive adjudication on the merits, res judicata prevents relitigation of the EEOc's claim.

The EEOC contends that no determination was ever made on the merits of the case. The first dismissal was a discovery sanction, without prejudice, and not on the merits. The second dismissal was with prejudice but occurred because the MDCR proceeded without an open complaint from King. In the present case the EEOC has an open and properly filed complaint from King. Additionally, in neither the first or second dismissal during the MDCR's representation did the Ingham County Circuit Court dismiss King's properly filed and pending complaint with the EEOC. The EEOC never presented its federal complaint to the Ingham County Circuit Court. Its rights could not

be determined without a full and fair opportunity to be heard.

The doctrine of res judicata forecloses relitigation of matters that were determined in a prior action in which the court entered a final judgment on the merits. However, due process protects a non-party from being bound by a judgment unless the non-party had a full and fair opportunity, directly or vicariously to present evidence and argument.

The MDCR's charge was dismissed twice. The first dismissal, without prejudice, was not even constructively on the merits, and therefore not sufficient for purposes of res judicata. The second dismissal was only constructively on the merits and was not even technically brought by King because she had not refiled a fresh complaint against Dykstra on which the MDCR could proceed. Since the EEOC and King did not have their claims under 42 U.S.C. §2000(e) decided on the merits, res judicata does not bar the present claim.

STATUTE OF LIMITATIONS

Defendant Dykstra argues that the EEOC's action is time barred by Michigan 's three year statute of limitation (Mich. Comp. Laws 600.5805(1)) (Mich. Stat. Ann. 27A.5805(1)) because the EEOC did not file its claim until September 30, 1986 on a claim that accrued on January 24, 1977.

Under *Occidental Life Insurance Co.* v. *EEOC,* 432 U.S. 355, 366-369 (1977) state statutes of limitation do not apply to EEOC actions to enforce Title VII. The EEOC claim is not time barred by the Michigan statute of limitation.

LACHES

Defendant Dykstra argues that the EEOC claim is barred by laches. Seventeen months lapsed between the

May 3, 1985 dismissal with prejudice of the MDCR's charge and the EEOC's filing of the instant claim on September 30, 1986. Dykstra claims that in good faith it reasonably believed that monitoring witness availability and maintaining relevant documents was no longer necessary. Dykstra claims that it is substantially prejudiced.

In *EEOC* v. *K-Mart*, 694 F.2d 1055 (6th Cir. 1985) the court defined laches as an unreasonable delay in asserting a claim that prejudices a defendant, proof of which requires: 1) lack of diligence of the party against whom the defense is asserted, and 2) prejudice to the asserting party.

In the present case Dykstra has not specified any unavailable witnesses or documents. The EEOC was in contact with Dykstra during the 17 month investigative interim. Moreover, Dykstra had a duty To maintain records relevant to the charge. 29 C.F.R. §1602.14.

Dykstra has not demonstrated that the delays in litigation were due to anything other than normal administrative, investigative, and appellate procedures.

WAIVER AND ESTOPPEL

Defendant Dykstra claims that the EEOC is estopped from asserting the claim by King's waiver in failing to refile a fresh claim after the first dismissal and her consent to the second dismissal in the Stipulation for Entry of Writ and Order of Superintending Control (dated: May 1, 1985).

In the present case King's complaint was properly on file with the EEOC. King's "neglect" to refile a fresh complaint with the MDCR and pursue state law remedies did not waive any of her federal rights with the EEOC. Also the MDCR, per Diane Rubin, and not King, signed the stipulation for Entry of Writ and Order of Superintending Control. The Stipulation for Entry of Writ and Order of Superintending Control and the actual Writ and

Order of Superintending Control focus on the MDCR and King's claim filed with the MDCR, even though the Stipulation for Entry includes the broad language "and/or claims of discrimination by Carol King" in ¶ 2 (b). Moreover, neither the Stipulation for Entry nor the actual Writ and Order of Superintending Control specifies King's complaint pending with the EEOC, of which all parties were aware at the time of the Writ and Order.

CONCLUSION

Defendant Dykstra's motion to dismiss and/or for summary judgment is denied.

IT IS SO ORDERED.

Grand Rapids, Michigan
October 2, 1987

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX ITEM #4

COMPLAINT

Carol E. King	Jack Dykstra Ford, Inc.
381-58-4500	
119 E. Kalamazoo, Apt. 3	3500 South Logan Street
Lansing, Mi. 48933	Lansing, Michigan 48910
484-9874	393-1820

Alleged Discrimination: Failure to Hire
Area of Discrimination: Employment
Date of Discrimination: 1/24/77
Basis of Discrimination: Sex

Statement of Alleged Discrimination:

On or about December 15, 1976 I applied for a sales position at Jack Dykstra Ford located in Lansing, Michigan. I filled out an employment application and was told to return for an interview with Mr. Jack Pagle. Mr. Pagle stated to me that he was very impressed with my qualifications and sales background, but the fact that I am a woman would create some problems. During our conversation, he attempted to discourage me from considering the position by emphasizing the undesirable aspects of the job, i.e., changing plates. For several weeks I was led to believe that I was being considered for the position; however, on January 24, 1977, I was informed by Terry Hanks that he could not hire me because I had exhausted my unemployment benefits from a previous job.

I believe that Mr. Jack Pagle never intended on giving me an opportunity at getting the sales

position. I further believe that I have been denied employment because of my sex. I am a woman.

I have not taken any action, civil or criminal, based upon the above except: EEOC

CAROL E. KING being duly sworn, deposes and says: that she he is the Claimant herein. She has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge except to matters therein stated on information and belief: that as to those matters she believes same to be true.

/s/ Carol E. King
Signature of Complaint
Complaint taken by Frank Perez

Subscribed and sworn to before me This 2nd day of February 1977 at Lansing Michigan
My Commission expires January 16, 1979

/s/ Frank Perez
Notary Public
Commissioned in Ingham County

NOTICE TO RESPONDENT:

This complaint is under the control of:

MR. ARTHUR SHEFEY Case Supervisor

Address

Telephone Number

The above complaint alleges a violation of Federal and or State civil rights law has occurred. We suggest that you review the condition which prompted this complaint and take any voluntary adjustive action that may be appropriate to resolve the matter prior to investigation. Such voluntary action, on your part, would not be construed as an admission of discrimination.

Your early response to me complaint will be appreciated. If the matter is resolved before we begin the investigation, please notify the Supervisor of any action you have taken.

Any questions regarding this complaint should be directed to the above-named Supervisor.

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
By: /s/ ?????
State of Michigan Plaza Building
1200 Sixth Avenue
Detroit, Michigan 48224

FEB 8 1977

APPENDIX ITEM #5

DATE FEB 2, 1977

Ms. Dolores L. Rozzi, District Director
Equal Employment Opportunity Commission
Michigan Building - Suite 600
220 Bagley
Detroit, Michigan 48226

Dear Ms. Rozzi:

I am enclosing a verified complaint of employment discrimination which I have this day filed with the Michigan Civil Rights Department. Please accept this as a complaint to the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 as amended. The Michigan Civil Rights Department is handling my case at this time.

I request that you do not take any action until the deferral period provided in Title VII for the Michigan Civil Rights Department to act has expired.

Thank you,

/s/ Carol E. King

NOTICE TO EEOC: MMDCR No.
EEOC No.
Carol E. King -v- Jack Dytestia Ford, Inc.
CLAIMANT: RESPONDENT:

is presently in Michigan Civil Rights Department Files, no further deferral is necessary. The Michigan Civil Rights Department will process this complaint. Please refrain from processing until we have reached a final disposition.

APPENDIX ITEM #6

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
231 W. Lafayette Street, Room 461
Detroit, Michigan 48226
Telephone: 226-7635

April 20, 1977
IN REPLY REFER TO:
Charge No. 054 77 1825

Chief Executive Officer
Jack Dykstra Ford, Inc.
3500 South Logan Street
Lansing, Michigan 48910

Dear Sir:

Enclosed is a copy of a charge which is now filed with the Equal Employment Opportunity Commission following appropriate deferral to the Michigan Civil Rights Commission as described in Section 706 of Title VII of the Civil Rights Act of 1964, as amended. Included with the copy(s) of the charge(s) are two (2) copies of EEOC Form 150, "Receipt for Copy of Charge of Discrimination".

Please sign the original receipt for charge, and return it in the enclosed self-addressed envelope.

If you wish to submit any information in writing, it will be made a part of the file. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations (see attachment) requires the preservation of all personnel records relevant to this charge until it is resolved.

Please contact this office immediately if this charge has already been completed by a State (706) Agency or if you are interested in engaging in settlement discussions. Additionally, do nt hesitate to contact this office should you have any questions.

Thank you in advance for your cooperation.

Sincerely,

/s/ Dolores L. Rozzi
Dolores L. Rozzi, Director
Detroit District Office

Enclosures

Copy of charge
Form 150
Regulation
Envelope

APPENDIX ITEM #7

State of Michigan
CIVIL RIGHTS COMMISSION
State of Michigan Plaza
1200 Sixth Street
Detroit, Michigan

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, ex rel CAROL KING,

Claimant,

v 5o. 33355-S1

DYKSTRA FORD, INC, a Michigan corporation,

Respondent.

CHARGE

The Complaint of Carol King, Claimant, having been filed with the Michigan Department of Civil Rights, alleging that the Respondent, Dykstra Ford, Inc., a Michigan corporation, its agents, servants and employees have unlawfully discriminated against the Claimant on account of sex and race in the enjoyment of her civil rights guaranteed by law and by the Constitution of the state of Michigan and the United States; and the said Department, in accordance with its own rules and regulations, having informed Respondent of such allegations, and having conducted an investigation in the premises, and having found as a result thereof, sufficient grounds for the issuance of a Charge, and having endeavored to conciliate the matter, but without success, now, therefore, issues this Charge and alleges:

I

At all times pertinent hereto, Claimant, Carol King, a black female, was a resident of the city of Lansing, county

of Ingham, state of Michigan; and the Respondent, Dykstra Ford, Inc., was a Michigan corporation doing business in the city of Lansing, county of Ingham, state of Michigan.

II

On or about December 15, 1976, Respondent was seeking one or more persons for employment in a sales position.

III

On or about December 15, 1976, Claimant applied for said position with Respondent.

IV

That Claimant was as well or better qualified by virtue of training and experience than white men hired for the sales position.

V

Notwithstanding Claimant's qualifications aforesaid, Respondent failed and refused to hire her.

VI

Said failure and refusal to hire Claimant was on account of unlawful considerations of sex and race.

VII

Respondent thereby discriminated against Claimant because of sex and race in the enjoyment of her civil rights guaranteed by law, to wit, here right to employment free from discrimination based on sex and race.

VIII

As a result of the unlawfully discriminatory conduct of Respondent aforesaid, Claimant has lost considerable sums

of money to which she otherwise would have been entitled and other valuable rights and benefits which would have resulted from employment with Respondent.

IX

As a result of the discriminatory conduct of Respondent aforesaid, Claimant has suffered extreme humiliation, embarrassment, mental anguish, emotional and physical distress.

WHEREFORE, is it prayed:

A. That Respondent, its agents, employees and servants cease and desist from unlawfully discriminating against Claimant on account of race and sex.

B. That Respondent be ordered to cease and desist from discriminating against all applicants for employment on account of race and sex with respect to hire, tenure, terms and conditions of employment.

C. That Respondent be ordered to offer the position of automobile sales person to Claimant with all seniority, benefits, promotions and pay increments as those which have accrued to the benefit of sales persons hired subsequent to December 15, 1976.

D. That Respondent reimburse Claimant for all wages and benefits, plus interest, lost by virtue of Respondent's unlawfully discriminatory conduct.

E. That Respondent pay to Claimant a sum of money that will fairly and justly compensate for the extreme humiliation, embarrassment, mental anguish and emotional and physical distress sustained as a result of Respondent's unlawfully discriminatory conduct.

F. That Respondent be ordered to report to the Michigan Department of Civil Rights for a period of three years by submitting on a quarterly basis all applications for its

sales force and by reporting the number, race and sex of all persons hired as salespersons.

G. That such further relief be granted as seems just and equitable.

/s/Edward J. Chastang, Jr.
Edward J. Chastang, Jr.
Director - Enforcement Bureau
Michigan Department of Civil Rights
1200 Sixth Street
Detroit, Michigan 48226

Dated: 4-8-80

Endorsed by:

/s/ Ruth Rasmussen
Ruth Rasmussen, Director
Michigan Department of Civil Rights

Dated: 4-9-1980

APPENDIX ITEM #8

STATE OF MICHIGAN

Civil Rights Commission
State of Michigan Plaza
1200 Sixth Street
Detroit, Michigan

MICHIGAN DEPARTMENT OF
CIVIL RIGHTS, ex rel
CAROL KING,

Claimant,

-vs- Case No. 33355-S1

DYKSTRA FORD, INC., a Michigan
corporation,

Respondent.

OPINION

On January 1, 1981, at the Detroit office of the Michigan Department of Civil Rights, the above entitled matter came on for hearing upon Respondent's Motion for Summary Judgment and/or An Accelerated Judgment.

The thrust of the Respondent's Motion turns on the interpretation by the Assistant Attorney General of the Michigan Civil Rights Commission Rule 37.5(a), which reads in pertinent part as follows:-

> "(2) The members of the commission and the department staff shall not disclose what has transpired in the course of such endeavors at conference and conciliation."

The instant matter commenced in late 1980 as an official hearing, and continued over many days of extensive tes-

timony culminating in a conflict surrounding the interviewing of one Phillip Creaser who had participated in a conciliation conference involving the Claimant and Respondent.

Mr. Creaser is an employee of the Michigan Department of Civil Rights. The writer, as referee, had ordered that Mr. Creaser be made available to the Respondent for an interview on November 17, 1980, at the Flint office of the Department of Civil Rights. The subject matter of the interview was to be limited to a narrow issue regarding certain governmental benefit forms allegedly used by the Respondent as a part of its hiring procedures. It was made abundantly clear to all concerned that the purpose of the interview was not to allow intrusion into efforts toward conciliation but rather to limit questioning to the use of the form. It was this referee's position that the aforementioned Rule 37.5(2) did not prohibit such inquiry and, as such, was permissible.

At this point in the proceedings, the Assistant Attorney General took the following position.

> "I want you to understand that I cannot agree to that. I may have to take it up."

The interview with Mr. Creaser was scheduled in the City of Flint with all parties noticed the following day. It appears that the scheduled interview did not take place since Mr. Creaser did not appear due to alleged car troubles. Mr. Creaser, however, did not notify any of the participants that he would not be available on the morning of the scheduled interview. His inability to be present and the reasons therefor were conveyed to this referee by the Assistant Attorney General.

The meeting with Mr. Creaser was again scheduled in the Lansing office of the Respondent with all parties being noticed and present. At that meeting, Mr. Creaser refused to answer questions relating to the policy of the

Respondent with respect to the utilization of the aforementioned forms. At this meeting, the Assistant Attorney General again reiterated her reliance on Rule 37.5(2) of the Michigan Civil Rights Commission Rules, supporting Mr. Creaser in his refusal to answer questions. It is the position of this referee that the Assistant Attorney General either directly or indirectly precluded productive interviews with Mr. Creaser by her posture relating to this very limited issue.

Throughout much of the proceedings in this case, the writer cautioned the Assistant Attorney General that her demeanor had left the impression that she was obstructing rather than facilitating the orderly deliberation of this case. At a particular juncture, this referee indicated an inclination to dismiss the case because of the Assistant Attorney General's posture, but was reluctant to do so because of the claimant's right to a full and complete adjudication of her claim. *It should be noted that this referee has not confused the Assistant Attorney General's posture with vigorous advocacy.*

The writer has spent a great deal of time evaluating what has occurred prior to this time and can pass no judgment as to the merits of the claimant's case. Suffice it to say that in the event further proceedings are deemed necessary, fairness to the Claimant would require abstention by this referee in that my objectivity would be tainted.

Finally, it is the decision of this referee that the Respondent's Motion for an Accelerated Judgment of dismissal be granted without prejudice, so that the claimant may continue to act upon her claim.

By /s/ Samuel L. Simpson
Samuel L. Simpson, Esq.
Hearing Referee
40th Fl., City National Bank Bldg.

Detroit, Michigan 48226
963-8080
DATED: March 18, 1981

APPENDIX ITEM #9

STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
ex rel, CAROL KING,

Claimant, File NO. 33355-S1

-vs- SAMUEL L. SIMPSON,
Hearing Referee

JACK DYKSTRA FORD, INC.,

Respondent.

Kenneth B. Williams (P23706)
Attorney for Respondent

Cassius E. Street, Jr. (P21087)
Attorney for Respondent

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY AND/OR ACCELERATED JUDGMENT OF DISMISSAL OF CLAIMANT'S CHARGE, WITHOUT PREJUDICE

At a session of the Civil Rights Commission for the State of Michigan, held at the Civil Rights Commission, 1200 Sixth Street, Detroit, Michigan, on this 18th day of March, A.D., 1981.

PRESENT: SAMUEL L. SIMPSON, Hearing Referee

This cause having been brought before the Hearing Referee on Motion of Respondent for Summary and/or Accelerated Judgment of Dismissal of Claimant's Charge, for refusal of one Phillip Creaser and counsel for the Michigan

Civil Rights Commission, Dianne Rubin, to comply with the Order of this Hearing Referee to make Phillip Creaser available to Respondent for interview on November 7, 1980 and on November 20, 1980, for the limited purpose set forth in the Hearing Referee's Opinion of March 18, 1981, and the Transcript of hearing at which such Order was issued, and the parties hereto having been represented by their respective counsel, and argument having been made by counsel and heard by this Hearing Referee, and this Hearing Referee having thoroughly considered the overall obstructionist demeanor and actions of the Assistant Attorney General in conjunction with Claimant's right to a full and complete adjudication of her claim, and this Hearing Referee being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that, for the reasons set forth in the Hearing Referee's Opinion of March 18, 1981, which is incorporated herein by reference, Respondent's Motion for Summary and/or Accelerated Judgment of Dismissal of Claimant's Charge be, and hereby is, GRANTED; and, further, that the within claim be, and hereby is, DISMISSED, without prejudice.

/s/ Samuel L. Simpson
SAMUEL L. SIMPSON, Hearing Referee

APPENDIX ITEM #10

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

MICHIGAN DEPARTMENT OF CIVIL RIGHT,
ex rel CAROL KING, File No. 81-27253-AA

Claimant/Appellee, JUDGE: BROWN

-vs-

JACK DYKSTRA FORD, INC., A Michigan Corporation,

Respondent/Appellant.

JACK DYKSTRA FORD, INC., A Michigan Corporation,

Plaintiff/Petitioner, File No. 81-27254-AA

-vs- JUDGE: BROWN

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, MICHIGAN CIVIL RIGHTS COMMISSION, RUTH RASMUSSEN, FATHER THEODORE E. LaMARRE, BEATRICE BANKS, CATHERINE C. BLACKWELL, BERRY C. GOODLETT, CAROLE L. CHIAMP, GILBERTO IBARRA, PAUL P. HARBRECHT, DR. FREDERICK G. SAMPSON and DIANNE RUBIN,

Defendants/Respondents.

Cassius E. Street, Jr. P-21087
Co-Counsel for Respondent/Appellant and

Plaintiff/Petitioner - Jack Dykstra Ford, Inc.

AMENDED ORDER OF SUPERINTENDING CONTROL, GRANTING PLAINTIFF/PETITIONER'S PETITION FOR WRIT OF SUPERINTENDING CONTROL, AND MOTION FOR SUMMARY JUDGMENT, AND DENYING DEFENDANT/RESPONDENTS "MOTION FOR SUMMARY JUDGMENT AND MOTION FOR ACCELERATED JUDGMENT AND/OR DISMISSAL; MOTION FOR DISMISSAL OF STAY OF PROCEEDINGS"

At a session of the above-entitled Court, held in the Circuit Courtrooms, City Hall, City of Lansing, County of Ingham, State of Michigan, on this 12th day of Nov., 1981.

PRESENT: HONORABLE THOMAS L. BROWN, Ingham County Circuit Judge

These matters having come on to be heard on: (1) the respective pleadings, Motions, documents, Briefs and oral arguments filed, and submitted in this cause, by the parties, and their respective counsel, and hearing having been held on these matters on September 23, 1981, and again on October 7, 1981; and (b) on the Motion for Rehearing or Amendment of Judgment dated October 22, 1981, filed by the Department of Civil Rights, and Jack Dykstra Ford, Inc.'s Answer thereto, and hearing thereon having been held on November 12, 1981; and the Court being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED, effective October 7, 1981, *NUNC PRO TUNC*, that:

1. Defendants/Respondents' "Motion for Summary Judgment" of June 12, 1981; and, "Motion for Accelerated Judgment and/or Dismissal; Motion for Dismissal of Stay of Proceedings", of August 14, 1981, be, and the same hereby are DENIED.

2. Plaintiff/Petitioner's "Motion for Summary Judgment", dated August 27, 1981, be, and the same hereby is, GRANTED, and an Order of Superintending Control, as hereafter set forth, is hereby issued: This Court's Order of Superintending Control hereby issues, and this Court hereby directs the Michigan Civil Rights Commission to enter a final Order dismissing, without prejudice, the CHARGE, dated April 8, 1981, and Complaint dated February 2, 1977 and filed February 8, 1977, relating to alleged charges of discrimination against Jack Dykstra Ford, Inc., by Carol King, against Jack Dykstra Ford, Inc., in Michigan Civil Rights Commission Case Number 33355-S1, entitled "*Michigan Department of Civil Rights, ex rel Carol King, Claimant v Dykstra Ford, Inc., a Michigan Corporation, Respondent*".

a. If such final Order dismissing said CHARGE, and Complaint, is not entered within ten (10) days from the date of this Writ and Order, then this Writ and Order shall become such final Order of Dismissal of said CHARGE, and Complaint, at that time, without further action of said Commission or this Court.

/s/ THOMAS L. BROWN
HONORABLE THOMAS L. BROWN
Ingham County Circuit Judge

COUNTERSIGNED:

/s/ ELIZABETH L. MURPHY
Deputy County Clerk

APPENDIX ITEM #11

STATE OF MICHIGAN
COURT OF APPEALS
LANSING

RECEIVED
JUN 6 1983

ATTORNEYS OF RECORD

Enclosed herewith is the decision and opinion in the entitled appeal, which we are releasing today. Pursuant to GCR 821.1, no "per curiam or memorandum opinions [are] to be printed unless so directed by any of the judges deciding the case." A publication stamp appears on the face of opinions so directed by a hearing judge. Opinions not designated for publication at the time of release are printed on pink paper.

Please not that the official date of the filing of this opinion is the date stamped thereon. This letter is also notice to you of the entry of the order of the Court of Appeals [see GCR 853.2(1)]. All time periods for further action under the rules will run from the date stamped on the opinion.

Very truly yours,

/s/ Ronald L. Dzierbicki
Ronald L. Dzierbicki
Chief Clerk

Enclosure

cc: Trial Judge
or Agency

STATE OF MICHIGAN
COURT OF APPEALS

JUN 03 1983

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, ex rel. CAROL KING,

Claimant-Appellant,

v. Docket No. 61336

JACK DYKSTRA FORD, INC., a Michigan corporation,

Respondent-Appellee,

JACK DYKSTRA FORD, INC., a Michigan corporation,

Plaintiff-Appellee,

v. Docket No. 61337

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, MICHIGAN CIVIL RIGHTS COMMISSION, RUTH RASMUSSEN, FATHER THEODORE E. LaMARRE, BEATRICE BANKS, CATHERIN C. BLACKWELL, BERRY C. GOODLETT, CAROLE L. CHIAMP, GILBERTO IBARRA, PAUL P. HARBRECHT, DR. FREDERICK G. SAMPSON and DIANNE RUBIN,

Defendants-Appellants.

BEFORE: Bronson, P.J., T. M. Burns and Allen, JJ.

PER CURIAM

Defendants appeal by right the trial court's order of superintending control, granting plaintiff's motion for summary judgment and directing defendant Civil Rights Com-

mission (CRC) to enter a final order dismissing the claimant's charge of discrimination without prejudice. On appeal, defendants raise several issues, as follows: (1) that the trial court lacked jurisdiction to consider plaintiff's petition to review CRC's order denying plaintiff's motion to dismiss; (2) that the trail court abused its discretion in exercising superintending control; and (3) that the trial court failed to issue sufficient findings of fact and conclusions of law, in that it did not file a written opinion explaining its decision. We find no error and affirm.

First, we find that the trial court did in fact have jurisdiction to review CRC's order, regardless of whether that order was final in nature. Assuming *arguendo* that defendants are correct in characterizing CRC's order as non-final, plaintiff could still properly obtain review under the Administrative Procedures Act, MCL 24.301; MSA 3.560(201). Under that act, a circuit court may properly review a non-final decision where the court concludes that the party seeking review would not have an adequate remedy in awaiting a "final" decision. In *Chrysler Corp* v *Civil Rights Commission*, 68 Mich App 283; NW2d (1976), this Court rejected a similar claim that a party to CRC proceedings must endure a lengthy hearing on the merits before a trail court may exercise superintending control to review a CRC order denying that party's motion to dismiss. 68 Mich App 289.

In the present case, defendants would foreclose all appeal until plaintiff endures a full-scale administrative hearing on the merits, certainly a "lengthy and costly proceeding" within the meaning of *Chrysler Corp, supra*. Such a delay is neither appropriate nor fair, where, as in *Chrysler, supra*, plaintiff does not seek review of the merits of the case, but instead only a review of the CRC order denying plaintiff's motion to dismiss. The circumstances of this case make it particularly improper to deny appeal pending a hearing on the merits; the underlying dispute concerns plaintiff's ability to obtain discovery from a CRC inves-

tigator, a matter crucial to plaintiff's preparation for any such proceeding. We agree with plaintiff that the dispute underlying this action must be resolved before the parties can present their case on the merits, and that, accordingly, the trial court acted properly in considering the matter when it did.

We next reject defendants' claim that the trial court abused its discretion in entering an order of superintending control, GCR 1963, 711. Superintending control lies to require an inferior tribunal to perform a function where that body has a clear legal duty to do so. See *People* v *Flint Municipal Judge*, 383 Mich 429, 431; 175 NW2d 750 (1970); *Gerber Products* v *Anderson, Clayton & Co*, 76 Mich App 410; 256 NW2d 754 (1977). The grant or denial of such an order is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Attorney General* v *Recorder's Court Judge*, 92 Mich App 42; 285 NW2d 53 (1979). Here, the underlying dispute concerns plaintiff's ability to obtain discovery from a CRC investigator, one Philip Creaser. Defendant's attorney refused to allow plaintiff to question Creaser about plaintiff's use of a particular employment applicaiton form. That form, as well as the employment policy which that form allegedly embodied, had been presented and discussed during the course of a conciliation conference involving Creaser, plaintiff, and the claimant. In refusing to allow plaintiff to question Creaser regarding the form, defendant's attorney cited Michigan Civil Rights Commission Rule 37.5(a), which provides in pertinent part:

> "(2) The members of the commission and the department staff shall not disclose what has transpired in the course of such endeavors at conference and conciliation."

According to defendant's attorney, since the form and underlying policy were discussed during a conciliation conference, the foregoing rule precluded plaintiff from making

them the subjects of discovery. Recognizing that such an application of Rule 37.5(a)(2), *supra*, could preclude plaintiff from presenting a crucial element of its defense to the discrimination charge, the hearing officer entered an order of dismissal, taking care to note that the dismissal was without prejudice. We believe that the trial court acted properly in entering its own order of superintending control, directing CRC to implement the hearing officer's order.

Plaintiff is asserting a clear and basic right, namely, that of obtaining discovery which could well be crucial in presenting its defense.[1] Defendant's application of Rule 37.5(a)(2), *supra*, is very clearly at odds with the apparent purpose of that rule, namely, to protect the confidentiality of settlement negotiations between parties to CRC proceedings. The rule was not intended to completely block a party's access to discovery concerning a matter, merely because that matter was mentioned during the course of a meeting which may have also touched upon the issue of conciliation. Certainly, defendant has not made any showing that plaintiff's proposed questioning of Creaser would in any way intrude into, or otherwise divulge, efforts at conciliation. The hearing officer's order of dismissal was proper, and the trial court's order directing its implementation was hardly an abuse of discretion.

---

[1] The fact that plaintiff is asserting a clear legal right—the right to an essential aspect of discovery—serves to distinguish this case from *Chrysler Corp* v *Dept of Civil Rights*, 117 Mich App 95; NW2d (1982); where this Court reversed an order of superintending control on the basis that declaratory judgment would have been a more appropriate remedy. 117 Mich App 104. There, the plaintiff sought to test defendant's interpretation of a different CRC discovery rule, 1979 AC R 37.15. This Court concluded that plaintiff's right to superintending control is "not so clear". 117 Mich App 104. The present case is different, and somewhat more akin to *In re Smith*, 106 Mich App 621; 308 NW2d 586 (1981), where the inferior tribunal denied the plaintiff a clear legal right (the presence of a court reporter at the proceedings).

In reaching this conclusion, we further note that the hearing officer's order of dismissal was specifically entered without prejudice to the claimant. This factor goes a long way toward distinguishing the present case from *MacArthur Patton* v *Farm Bureau Ins*, 403 Mich 474; 270 NW2d 101 (1978), relied on so heavily by defendants. There, the Supreme Court reversed a lower court's order dismissing a case because the plaintiff's agent and attorney refused to cooperate in discovery. The Supreme Court observed that "the most drastic sanction of dismissal with prejudice was not justified by the facts of this case", 404 Mich App 474, 478. Here, the sanction—dismissal without prejudice—was nowhere near as "drastic". The claimant remains free to renew proceedings on her charge of discrimination. Defendant has not been deprived of all opportunity to represent the claimant, should the latter see fit to initiate new proceedings. However, at the very least, the trial court's order ensures that plaintiff will not have to endure the flawed proceedings below where discovery was improperly withheld.

Finally, we reject defendants' claim that the trail court erred in failing to issue formal written findings or a written opinion. At the hearing before the trial court, the parties fully discussed the issue of whether the court should write an opinion explaining its decision. At the close of the discussion, defendants' attorney unequivocally waived the issuance of any opinion.

Affirmed.

/s/ S. Jerome Bronson
/s/ Thomas M. Burns
/s/ Glenn S. Allen, Jr.

APPENDIX ITEM #12

STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION
State of Michigan Plaza
1200 Sixth Street
Detroit, Michigan

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, ex rel. CAROL KING,

Claimant,

v No. 33355-S1

DYKSTRA FORD, INC. a Michigan corporation,

Respondent.

CHARGE

The Complaint of Carol King, Claimant, having been filed with the Michigan Department of Civil Rights, alleging that the Respondent, Dykstra Ford, Inc., a Michigan corporation, its agents, servants and employees have unlawfully discriminated against the Claimant on account of sex and race in the enjoyment of her civil rights guaranteed by law and by the Constitution of the state of Michigan and the United States; and the said Department, in accordance with its own rules and regulations, having informed Respondent of such allegations, and having conducted an investigation in the premises, and having found as a result thereof, sufficient grounds for the issuance of a Charge, and having endeavored to conciliate the matter, but without success, now, therefore, issues this Charge and alleges:

I

At all times pertinent hereto, Claimant, Carol King, a black female, was a resident of the city of Lansing, county of Ingham, state of Michigan; and the Respondent, Dykstra Ford, Inc., was a Michigan corporation doing business in the city of Lansing, county of Ingham, state of Michigan.

II

On or about December 15, 1976, Respondent was seeking one or more persons for employment in a sales position.

III

On or about December 15, 1976, Claimant applied for said position with Respondent.

IV

Claimant was as well or better qualified by virtue of training and experience than white men hired for the sales position.

V

Notwithstanding Claimant's qualifications Respondent failed and refused to hire her.

VI

The failure and refusal to hire Claimant was on account of unlawful considerations of sex and race.

VII

Respondent thereby discriminated against Claimant because of sex and race in the enjoyment of her civil rights

guaranteed by law, that is, here right to employment free from discrimination based on sex and race.

VIII

As a result of the unlawfully discriminatory conduct of Respondent, Claimant has lost considerable sums of money to which she otherwise would have been entitled and other valuable rights and benefits which would have resulted from employment with Respondent.

IX

As a result of the discriminatory conduct of Respondent, Claimant has suffered extreme humiliation, embarrassment, mental anguish, emotional and physical distress.

WHEREFORE, it is prayed:

A. That Respondent, its agents, employees and servants cease and desist from unlawfully discriminating against Claimant on account of race and sex.

B. That Respondent be ordered to cease and desist from discriminating against all applicants for employment on account of race and sex with respect to hire, tenure, terms and conditions of employment.

C. That Respondent be ordered to offer the position of automobile sales person to Claimant with all seniority, benefits, promotions and pay increments as those which have accrued to the benefit of sales persons hired subsequent to December 15, 1976.

D. That Respondent reimburse Claimant for all wages and benefits, plus interest, lost by virtue of Respondent's unlawfully discriminatory conduct.

E. That Respondent pay to Claimant a sum of money that will fairly and justly compensate for the extreme humiliation, embarrassment, mental anguish and emotional

and physical distress sustained as a result of Respondent's unlawful discriminatory conduct.

F. That Respondent be ordered to report to the Michigan Department of Civil Rights for a period of three years by submitting on a quarterly basis all applications for its sales force and by reporting the number, race and sex of all persons hired as salespersons.

G. That such further relief be granted as seems just and equitable.

/s/ Edward J. Chastang, Jr.
Edward J. Chastang, Jr.
Director, Enforcement Bureau
Michigan Department of Civil Rights
1200 Sixth Street
Detroit, Michigan 48226

Dated: July 12, 1983

Endorsed by:

/s/ Ronald L. Quingy
Dr. Ronald L. Quincy, Director
Michigan Department of Civil Rights

Dated: July 12, 1983

APPENDIX ITEM #13

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

JACK DYKSTRA FORD, INC., A Michigan Corporation
Plaintiff/Petitioner/Appellant File No. 83-51361-AA

-vs- JUDGE: THOMAS L. BROWN

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, et. al.,

Defendants/Respondents/Appellees.

Cassius E. Street, Jr. P-21087
Counsel for Plaintiff/Petitioner/Appellant
2401 E. Grand River Avenue
Lansing, Michigan 48912 487-8300

Dianne Rubin P-25142
Counsel for Defendants/Respondents/Appellees/

STIPULATION FOR ENTRY OF WRIT AND ORDER OF SUPERINTENDING CONTROL

IT IS STIPULATED between the parties, as follows:

1. A WRIT AND ORDER OF SUPERINTENDING CONTROL, in the form attached hereto as *ATTACHMENT A* shall be entered by the Court, without further Hearing or Notice.

2. In consideration for Plaintiff's agreement to refrain from making any effort to collect any additional costs, expenses, and/or attorney's fees, from Defendants, only, pursuant to statute, Court Rule, or any other claimed legal

authority therefor, except as expressly set forth in *ATTACHMENT A*, but reserving to Plaintiff any and all rights it has to obtain such costs, expenses and/or attorney's fees from any other person or party, other than those specifically named as parties Defendant in this case, Defendants, and their successors, representatives and assigns to hereby agree that they shall: (a) immediately dismiss, with prejudice, the "CHARGE" issued and dated July 12, 1983, as directed in said WRIT AND ORDER OF SUPERINTENDING CONTROL; (b) permanently dismiss and terminate, with prejudice, any and all further proceedings related to said "CHARGE", and/or any underlying "COMPLAINT", and/or claims of discrimination by Carol King, against Plaintiff, arising out of, or in any way related to, acts that allegedly occurred during the period of on or about December 15, 1976, to January 24, 1977; (c) permanently refrain from reopening Complaint or Case #33355-S1 and/or from representing Carol King, in any way, directly or indirectly, in connection with the alleged acts of discrimination referred to therein; and (d) hereby waive, and agree that they will not directly or indirectly, file, pursue, or in any manner be involved in, in any way, any kind of an appeal from the entry of said WRIT and ORDER OF SUPERINTENDING CONTROL, as attached hereto as *ATTACHMENT A*, which WRIT and ORDER OF SUPERINTENDING CONTROL shall be entered, and observed, as the *final Order* in this cause.

BY: /s/ Cassius E. Street	BY: /s/ Dianne Rubin
CASSIUS E. STREET, JR. P-21087	DIANNE RUBIN P-25142
Counsel for Plaintiff	Counsel for Defendants
BUSINESS ADDRESS:	BUSINESS ADDRESS:
2401 E. Grand River Avenue	1840 State of Michigan Plaza
Lansing, Michigan 48912	1200 Sixth Street
	Detroit, Michigan 48226
Dated: May 1, 1985	Dated: May 1, 1985

APPENDIX ITEM #14

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

JACK DYKSTRA FORD, INC., A Michigan Corporation,

Plaintiff/Petitioner, Appellant,

-vs-

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, et. al.,

Defendants/Respondents/Appellees.

WRIT AND ORDER OF SUPERINTENDING CONTROL

File No. 83-51361-AA

JUDGE: THOMAS L. BROWN

Cassius E. Street, Jr., P-21087
Counsel for Plaintiff/Petitioner/Appellant
2401 E. Grand River Avenue
Lansing, Michigan 48912 487-8300

Dianne Rubin P-25142
Counsel for Defendants/Assistant Attorney General

At a session of the above-entitled Court, held in the Circuit Courtrooms, City Hall, Lansing, Michigan, County of Ingham, State of Michigan, on this 3rd day of May, A.D., 1985.

PRESENT: HONORABLE THOMAS L. BROWN, Ingham County Circuit Judge

This matter having come on to be heard on Plaintiff/Petitioner/Appellant's "COMPLAINT AND PETITION FOR WRIT OF SUPERINTENDING CONTROL, ETC.", dated December 29, 1983, and Defendants/Respondents/Appellees' "Motion to Dismiss Claim, Etc.", and the Briefs and Oral Arguments submitted in regard thereto at the Hearing on April 3, 1985, and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendants/Respondents/Appellees' "Motion to Dismiss Claim, Etc.", be, and the same hereby is, DENIED.

2. Plaintiff/Petitioner/Appellant's "Complaint and Petition for Writ of Superintending Control, Etc.", be, and the same hereby is, GRANTED, and This Court hereby issues its WRIT AND ORDER OF SUPERINTENDING CONTROL, directed to the Michigan Civil Rights Commission and/or Department of Civil Rights hereby ordering and directing the Michigan Civil Rights Commission and/or Department of Civil Rights to forthwith enter a *final Order:*

> A. Dismissing, with prejudice, the "CHARGE" issued and dated July 12, 1983, in Michigan Civil Rights Commission Case #33355-S1, entitled *"Michigan Department of Civil Rights, Ex Rel: Carol King, Claimant v Dykstra Ford, Inc. a Michigan Corporation, Respondent"*, related to alleged claims, by Carol King, of acts of discrimination by Jack Dykstra Ford, Inc., against Carol King that allegedly occurred during the period of on or about December 15, 1976 to January 24, 1977, the Claimant, Carol King, having taken no action to renew proceedings, or initiate new proceeding on her claims of discrimination against Jack Dyk-

stra Ford, Inc., after June 3, 1983, the date of the Michigan Court of Appeals' Decision affirming this Court's prior Writ and Order of Superintending Control, dated November 12, 1981, dismissing the COMPLAINT, dated February 2, 1977, and filed February 8, 1977, and the identical "CHARGE" dated April 8, 1980, based thereon; and

B. Permanently dismissing and terminating, with prejudice, all further proceedings relating to said COMPLAINT, "CHARGE", and/or claims of discrimination against Jack Dykstra Ford, Inc.

3. If the civil Rights Commission and/or Department of Civil Rights fails to issue, and enter, such final Order dismissing said "CHARGE" and dismissing and terminating all further proceedings related to said COMPLAINT, "CHARGE", and/or claims of discrimination against Jack Dykstra Ford, Inc., with prejudice, within ten (10) days from the date of this WRIT AND ORDER, then this WRIT AND ORDER shall automatically, at the expiration of said ten (10) day period, become, constitute and stand as such final Order, by the Civil Rights Commission, and Department of Civil Rights dismissing said "CHARGE", and permanently dismissing and terminating all further proceedings related to said COMPLAINT, "CHARGE" and/or to said claims of discrimination against said Jack Dykstra Ford, Inc., with prejudice.

4. By Stipulation of the parties, Defendants shall promptly pay to Plaintiff, for costs, expenses and fees, as sought by Plaintiff in connection with these proceedings, the sum of $107.15, representing taxable costs, but without an award of attorney's fees.

/s/ THOMAS L. BROWN
HONORABLE THOMAS L. BROWN
Ingham County Circuit Judge

COUNTERSIGNED:
CAROL D. DAVIS
Deputy County Clerk

APPENDIX ITEM #15

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Room 1540-Patrick V. McNamara Bldg
477 Michigan Avenue
Detroit, Michigan 48226
Telephone 226-7636

IN REPLY REFER TO:
April 12, 1985
Charge No. 054-77-1825

Carolyn E. King
119 E. Kalamazoo
Apt. 3
Lansing, MI 48933

Charging Party

and

Jack Dykstra Food, Inc.
3500 South Logan Street
Lansing, MI 48910

Respondent

DETERMINATION

Under the authority vested in me by the Commission's procedural Regulations, *Issue* on behalf of the Commission, the following determination as to the *merits* of the *subject charge.*

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the finding of the Michigan Department of Civil rights.

Having examined the findings and the record presented, I conclude that there is reasonable cause to believe the charge is true.

A review of the record presented indicates that the Agency

was unsuccessful in its attempts to settle the matter. The Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. The parties may indicate their willingness to enter into settlement discussions by completing the enclosed invitation to conciliation and returning it to this office in the enclosed self-addressed envelope within 5 days of receipt of this letter.,

Sincerely,

DATE: 4/17/85

/s/ Preston David
PRESTON DAVID
District Director

Enclosure
Invitation

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

INVITATION TO PARTICIPATE IN SETTLEMENT DISCUSSIONS

Section 706(b) of Title VII, Civil Rights Act of 1964, as amended, requires that when the Commission determines there is a reasonable cause to believe the charge is true, it shall endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliations, and persuasion. This invitation is being issued to both parties to determine their willingness to engage in such settlement discussions. If either party declines discussion, or the Commission is unable to secure an acceptable settlement, the District Director shall inform both parties, in writing, of alternatives for obtaining relief available to the Charging Party(ies) and the Commission.

Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

DATE	CHARGE NUMBER
April 12, 1985	054-77-1825

PLEASE COMPLETE THE FOLLOWING INFORMATION AND RETURN TO EEOC IN ATTACHED SELF-ADDRESSED ENVELOPE

TO:	FROM: *(Name and address of charging party or respondent)*
EQUAL EMPLOYMENT OPPORTUNITY COMM. DETROIT DISTRICT OFFICE PATRICK V. MCNAMARA BLDG., 15th FL. 477 MICHIGAN Avenue DETROIT, MI 48226	Jack Dykstra Food, Inc. 3500 South Logan Street Lansing, MI 48910

I ☐ WILL ☐ WILL NOT ENGAGE IN SETTLEMENT DISCUSSIONS

DATE	SUGGESTED TIME
LOCATION	
COMMENTS	
DATE	TELEPHONE NUMBER WHERE SIGNEE CAN BE REACHED
TYPED NAME OF CHARGING PARTY/RESPONDENT	SIGNATURE

APPENDIX ITEM #16

CARR STREET & GRUA
LAWYERS
2401 EAST GRAND RIVER AVENUE
LANSING, MICHIGAN 48912
TELEPHONE 487-8300
AREA CODE 517

April 19, 1985

Mr. Charles Taylor
Equal Employment Opportunity Commission
Room 1540 - Patrick V. McNamara Bldg.
477 Michigan Avenue
Detroit, Michigan 48226

RE: Charge No. 054-77-1825
Carol King v Jack Dykstra Ford, Inc.

Dear Mr. Taylor:

I appreciated the opportunity of discussing this matter with you yesterday on the telephone. Pursuant to our discussion, and in the hope that this will permit proceedings under the jurisdiction of EEOC to be dismissed and terminated, I am furnishing the following information, and enclosing the following materials.

[1] Ingham County Circuit Court "Amended Order of Superintending Control, Etc." of November 12, 1981, dismissing the original Complaint and Charge.

[2] Copy of Michigan Court of Appeals' Decision of June 3, 1983 "Affirm(ing)" the dismissal of the original Complaint and Charge.

[3] Copy of the proposed Writ and Order of superintending Control submitted to Ingham County Circuit Court, to be entered on April 23, 1985, in accordance with the Court's

ruling from the bench at the Hearing of April 2, 1985; and, our Notice of Submission Thereof.

[4] Copy of the letter of April 16, 1985 to the Ingham County Clerk, extending the time for the entry of the proposed Writ and Order of Superintending Control to the April 23, 1985 date, and reflecting the settlement discussions.

The proposed Writ and Order (item 3 above) was submitted to Judge Brown under the 7-day Rule, and was originally scheduled to have been entered on Tuesday, April 16, 1985. Because of the settlement discussions that we had engaged in with the Assistant Attorney General, as I explained to you, we agreed to put off until April 23rd the submission of this Order to the Court for signature and entry. No "Objections" have yet been filed to the Order, and it is my understanding that none are contemplated.

As you can see from the proposed Writ and Order of Superintending Control, which will now dismiss the identical, second "Charge" issued by the Michigan Civil Rights Commission, *"with prejudice"*, the Claimant, Carol King, did not take any action, *after* June 3, 1983, (the date of the Michigan Court of Appeals' Decision affirming the Circuit Court's dismissal of the original Complaint, and first Charge based thereon), to "renew proceedings", on her claims of discrimination, or "to initiate new proceedings", on such claims, as permitted by the Court of Appeals' Decision, had she seen fit to take such action.

After we submitted the proposed Writ and Order, I received a call from the Assistant Attorney General. She acknowledged that the proposed Writ and Order comported with the Judge's ruling from the bench, but asked if we would be willing to delete paragraph 4 thereof, in consideration of The Michigan Civil Rights Department's agreement not to appeal the entry of the Writ and Order, and dismissal and termination of any and all other proceedings in this matter. I expressed a willingness to pro-

ceed in that fashion, if all possible matters, arising out of the alleged acts of discrimination, could be put to rest at this time. In that regard, I indicated we would be willing to delete that paragraph, and not pursue our rights to claim costs, and actual attorney's fees, against the named Defendants, in this pending action, or Carol King herself (pursuant to applicable statutes [Acts 196 and 197, PA 1984], and "New Court Rules" [MCR 2.114 (D), (E)], or other applicable law), in return for a complete and general Release from Carol King, as to any and all claims of any kind or nature that she might otherwise still retain against our client. While it appears to us as if she has no such residual claims at this time, because of the bar of applicable periods of limitation (both as to any possible civil action she might have, in Court, against our client, and/or with regard to any other administrative proceedings, either state or federal), we wanted to be able to put all matters to rest at this time, and thus were willing to give up what we believe to be legitimate claims for costs and attorney's fees, as referred to above, in return for a Release that would clearly result in putting everything to rest at this time. The Attorney General indicated that she would make contact with Carol King to see if she was willing to submit such a Release, and would let me know. There was even discussion as to the "Assignment" of our right to obtain "taxable court costs" to Carol King, as further consideration for her Release. That was the case these matters where in - with us waiting to hear from the Attorney General when, to our shock and dismay, our client received the communication of April 12, 1985 from your office.

It appears to us as if any authority that the EEOC might, at one time, have had to take action, based upon the "dual filing", and agency relationship between EEOC and MCRC/D, has been barred by the passage of the applicable periods of limitation, which resulted in the *dismissal of the original Complaint* filed by Carol King, and the *first Charge*, based

thereon, no further Complaint having been filed, or action taken, by Carol King, since June 3, 1983, the date of the Court of Appeals' affirmance of such dismissal.

Additionally, it is our position that we have a valid basis to claim costs, and attorney's fees, not only against the Michigan Civil Rights Department, and Commission, and the other parties named as Defendants in our pending Ingham County Circuit Court action, but also against Carol King, herself, individually. Therefore, our willingness to waive and release these claims (the monetary value of which would be substantial) appears to us to serve as substantial consideration for, and storing practical motivation for, *all parties*, putting *all matters* to rest at this time, without further expenditure of effort and expense, and further exposure of the claimant to costs and actual attorney's fees.

All of this dates back to acts of alleged discrimination in December, 1976, or January, 1977. Our client strenuously denies, on the merits, any such acts of discrimination, and our investigation of the facts, including the interviews of all relevant witnesses, leads us to believe that no such discrimination took place. However, be all of that as it may, at this point in time, it appears as if justice will best be served, in terms of the interests of all parties, to put everything to rest at this time. Therefore, it is our request that, as soon as you have reviewed these materials, you give me a call so that we can make the necessary agreements, take the necessary steps, and execute the necessary documents to bring EEOC proceedings to a conclusion as well as all of the other possible proceedings related to these ancient allegations, *based upon a Complaint, and Charge, that were dismissed on June 3, 1983.*

I will certainly look forward to receiving your call.

I am at a loss as to just what response to make to the communication of April 12, 1985, enclosing the "Invitation to Participate in Settlement Discussions". Our client cer-

tainly does not intend to "engage in settlement discussions", other than what has been suggested in this letter. Therefore, we do not intend to make any other response to that communication of April 12, 1985, nor the "Invitation", which it enclosed, except that which I have set forth in this letter, which we would ask be viewed as a response thereto, in the form of a "Motion to Dismiss" further proceedings, and/or proposal for settlement of anything coming within your Commission's jurisdiction.

I will await your call.

Yours very truly,

CARR, STREET & GRUA

/s/ Cassius E. Street,, Jr.
Cassius E. Street, Jr.

CES/jad
Enc.

cc: Dykstra Ford, Inc.

APPENDIX ITEM #17

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Room 1540-Patrick V. McNamara Bldg
477 Michigan Avenue
Detroit, Michigan 48226
Telephone 226-7636

May 9, 1985

MAY 10 RECD

IN REPLY REFER TO:
EEOC NO: 054-77-1825
MDCR NO: 33355-S1

Ms. Carolyn E. King
119 E. Kalamazoo
Apartment 3
Lansing, MI 48933

Dear Ms. King:

The letter you received from this office dated 4/12/85 was sent to you in error. This is to inform you that pursuant to EEOC rules and regulations, we are rescinding the previously issued closure letter. Your charge is currently being pursued by the Michigan Department of Civil Rights and this Commission will await the termination of MDCr's proceedings. Please accept our apology for any inconvenience our error may have caused.

If you have any questions, please contact this office by calling Ruth Scott, State/Local/Coordinator at (313) 226-4602.

Sincerely,

/s/ Preston David
Preston David, Director

Detroit District Office

cc: Respondent

Jack Dystra Food, Inc.
3500 South Logan Street
Lansing, MI 48910

APPENDIX ITEM #18

CARR, STREET & GRUA
2401 EAST GRAND RIVER AVENUE
LANSING, MICHIGAN 48912
TELEPHONE 487-8300
AREA CODE 517

May 20, 1985

Mr. Charles Taylor
Legal Counsel
Equal Employment Opportunity Commission
Room 1540 - Patrick V. McNamara Building
477 Michigan Avenue
Detroit, Michigan 48226

RE: "Charge No. 054-77-1825
MDCR No. 33355-S1"

Dear Mr. Taylor:

This is a follow-up to my letter of April 19th, 1985 to you, in which, pursuant to your request, I submitted certain information and materials for you to review, following which you indicated you would be back in touch with me. In our phone conversation of April 18th, in which we discussed the matter, and you requested that we submit a letter confirming our phone conversation, you indicated that there was a strong likelihood that if your review of the matter confirmed what I had described to you, that further proceedings in EEOC would be terminated and dismissed.

On April 26th I called your office to find out what decision had been made in that regard, and was told that you were out of the office, would be back shortly, and that you would be asked to return my call. Thereafter, when I did not receive a call from you, I again called your office on April 30th, with the same result. Since that unsuccessful

effort to contact you by phone, I have called, and left word again, on no less than five separate occasions, each time being told that you were either "out", "busy", "on the other line", or otherwise unable to talk to me, but that you would call back shortly. To this date, I have not yet heard from you.

On May 10th, 1985, my client apparently received, by mail, another letter (copy enclosed) from your office. In view of the earlier letter from your office, and our phone discussion, it is impossible for me to understand what is intended by this recent letter. I would? therefore, appreciate your giving me a call upon receipt of this letter, so that I can intelligently advise my client as to the status of this matter. It is our position that there is no longer any legal basis of any kind for any sort of Federal/EEOC proceeding against our client, since any and all such proceedings are barred by applicable periods of limitation, the sole underlying "Complaint", filed by the Claimant, having *long ago* been dismissed, i.e., on June 3, 1983. I am also enclosing a copy of the recently-entered Writ and Order of Superintending Control, dismissing the Michigan Civil Rights Commission proceedings, incident to a 2nd Charge issued without any Complaint on file.

I trust that with this additional information, you are now in a position to send *me* a written confirmation of the fact that any and all further EEOC proceedings are being terminated and dismissed. It would further be our position, of course, that if such proceedings were not *permanently* terminated at this time, under these circumstances, that this would constitute the basis for our client's obtaining costs and actual attorney's fees against EEOC, and Ms. King (if she participates in such further proceedings), under the Federal Equal Access to Justice Act, and the President's Memorandum of November 9, 1984 to all executive departments and agencies, concerning the continued viability and applicability of the policies and sanctions contained in the Federal enactment, and/or its state law

counter-part. In view of the circumstances of this case, as we have explained them to you, it is our position that any further action by EEOC would be unreasonable, without substantial justification, and constitute agency action in bad faith.

I will look forward to receiving from your agency the appropriate agency Order or action permanently terminating any further proceedings.

Yours very truly,

CARR, STREET & GRUA

Cassius E. Street, Jr.

CES/jad
Enc.

cc: Jack Dykstra Ford, Inc.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Room 1540-Patrick V. McNamara Bldg
477 Michigan Avenue
Detroit, Michigan 48226
Telephone 226-7636
May 9, 1985

MAY 10 REC'D

IN REPLY REFER TO:
EEOC NO: 054-77-1825

MDCR NO: 33355-S1

Ms. Carolyn E. King
119 E. Kalamazoo
Apartment 3
Lansing, MI 48933

Dear Ms. King:

The letter you received from this office dated 4/12/85 was sent to you in error. This is to inform you that pursuant to EEOC rules and regulations, we are rescinding the previously issued closure letter. Your charge is currently being pursued by the Michigan Department of Civil Rights and this Commission will await the termination of MDCR's proceedings. Please accept our apology for any inconvenience our error may have caused.

If you have any questions, please contact this office by calling Ruth Scott, State/Local/Coordinator at (313) 226-4602.

Sincerely,

/s/ Preston David
Preston David, Director
Detroit District Office

cc: Respondent

Jack Dystra Food, Inc.

3500 South Logan Street
Lansing, MI 48910

APPENDIX ITEM #19

CARR, STREET & GRUA
LAWYERS
2401 EAST GRAND RIVER AVENUE
LANSING, MICHIGAN 48912
TELEPHONE 487-8300
AREA CODE 517

June 11, 1985

Mr. Charles Taylor
Legal Counsel
Equal Employment Opportunity Commission
Room 1540 Patrick V. McNamara Building
477 Michigan Avenue
Detroit, Michigan 48226

RE: "Charge No. 054-77-1825
MDCR No. 33355-S1"

Dear Mr. Taylor:

Would you please send me a copy of the Commission Order dismissing and terminating further proceedings in this matter, so that we can close our file.

Thank you.

Yours very truly,

CARR, STREET & GRUA
/s/ Cassius E. Street, Jr.
Cassius E. Street, Jr.

CES/jad

APPENDIX ITEM #20

CARR, STREET & GRUA
LAWYERS
2401 EAST GRAND RIVER AVENUE
LANSING, MICHIGAN 48912
TELEPHONE 487-8300
AREA CODE 517

July 11, 1985

Mr. Charles Taylor
Legal Counsel
Equal Employment Opportunity
Commission
Room 1540 - Patrick V. McNamara
Building
477 Michigan Avenue
Detroit, Michigan 48226

RE: "Charge No. 054-77-1825
MDCR No. 33355-S1"

Dear Mr. Taylor:

Would you please send me a letter confirming your prior assurances to me that EEOC would be taking no further action of any kind in this matter.

Thanks.

Very truly yours,

CARR, STREET & GRUA

Cassius E. Street, Jr.

CES/jad

APPENDIX ITEM #21

CARR, STREET & GRUA
LAWYERS
2401 EAST GRAND RIVER AVENUE
LANSING, MICHIGAN 48912
TELEPHONE 487-8300
AREA CODE 517

September 9, 1985

Mr. Charles Taylor
Legal Counsel
Equal Employment Opportunity
Commission
Room 1540 - Patrick V. McNamara
Building
477 Michigan Avenue
Detroit, Michigan 48226

RE: "Charge No. 054-77-1825
MDCR No. 33355-S1"

Dear Mr. Taylor:

Enclosed for filing in whatever sort of existing file there might be in the EEOC, with regard to a purported claim of discrimination by Carol King against Jack Dykstra Ford, Inc., is Jack Dykstra Ford, Inc.'s (Request and Notice dated September 9, 1985.)

Based upon the prior assurances given to this office by your office, and this Request and Notice, we are closing our file in this matter.

Yours very truly,

CARR, STREET & GRUA

assius E. Street, Jr.
Cassius E. Street, Jr.

CES;
jad
Enc.
cc: Jack Dykstra Ford, Inc.

CARR, STREET & GRUA
LAWYERS
2401 EAST GRAND RIVER AVENUE
LANSING, MICHIGAN 48912
TELEPHONE 487-8300
AREA CODE 517

September 9, 1985

Ms. Diane Rubin
Assistant Attorney General
1840 State of Michigan Plaza
1200 Sixth Street
Detroit, Michigan 48226 - 2476

REQUEST AND NOTICE

RE: Dykstra Ford v Michigan Department of Civil Rights/File No. 83-51361-AA/Carol King MDCR #33355-S2 (sic)-SHOULD BE 33355-S1

Dear Ms. Rubin:

This is a follow-up to our phone conversation of September 6, 1985, regarding the Michigan Department of Civil Rights "NOTICE OF DISPOSITION/ORDER OF DISMISSAL" dated August 7, 1985, which we received in this office on or about August 16, 1985. Please treat this as the official filing with, and service upon, the named "Defendants/ Respondents/Appellees", in the above-referenced case, of Jack Dykstra Ford, Inc.'s REQUEST AND NOTICE in the permanent, official, departmental/commission file in Michigan Department of Civil Rights Case No. 33355-S2. We are serving this Request and Notice upon you, as attorney for the parties Defendant in said Ingham County Circuit Court litigation, including the Michigan Department of Civil Rights, and Civil Rights Commission, and do hereby request that you see to it that one of the enclosed

copies of this Request and Notice is filed with, and served upon, each of those parties.

It is our client's position, and therefore the purpose of this Request and Notice, to so notify your clients, and therefore to officially place upon the record, the following:

(1) The purported "NOTICE OF DISPOSITION/ORDER OF DISMISSAL", dated August 7, 1985, is a nullity, since the Ingham County Circuit Court Writ and Order of Superintending Control of May 3, 1985, directed the Civil Rights Commission and/or Department of Civil Rights:

"...to forthwith enter a *Final Order:*

a. Dismissing, with prejudice, the Charge issued and dated July 12, 1983, in Michigan Civil Rights Commission Case No. 33355-S1..."

the Complaint, dated February 2, 1977, and filed February 8, 1977, on which such Charge was based, having previously been dismissed by Order of the Michigan Court of Appeals. If the Michigan and/or Department failed to issue and enter such a Final Order dismissing the Charge, and dismissing and terminating all further proceedings related to said Complaint, Charge, and/or claims of discrimination against Jack Dykstra Ford, Inc., *with prejudice,* within *10 days* from the date of the Writ and Order (i.e., on or before May 13, 1985), then the:

"...Writ and Order ... automatically, at the expiration of said 10-day period, bec(a)me, constitute(d), and stand(s) as such final Order ... dismissing said Charge, and permanently dismissing and terminating all further proceedings related to said Complaint, Charge, and/or to said claims of discrimination against Jack Dykstra Ford, Inc., with prejudice."

Since this purported action by the Commission/Department was apparently taken on August 7, 1985—substantially beyond the 10-day period referred to above—the Writ and Order of Superintending Control automatically became, and stands, as such a Final Order of dismissal with prejudice. Therefore, this document is of no force and legal effect, and the operative language of the Writ and Order, dismissing said Charge, with prejudice, is the Order of the Department/Commission, in lieu of this document sent to us. We want to make certain that a full copy of the Stipulation, and Writ and Order of Superintending Control are a part of the official record of the Department/Commission; and, we are, therefore, enclosing additional copies for such filing.

(2) If this document was *not* a legal nullity (i.e., if it had been issued within the 10-day period directed by the Writ and Order), it clearly does not comport with the Writ and Order, and, in fact, appears to be a rather contemptuous violation of the Writ and Order of the Circuit Court, since:

(a) It is not a dismissal "with prejudice";

(b) It speaks of another governmental agency "assuming jurisdiction" to "process a Charge", when there is no such Charge, or underlying complaint, still in factual and legal existence; and

(c) There is no jurisdictional basis for any action to be pursued by any other agency, there being absolutely no Complaint or Charge of any kind legally in existence at this time, to provide such requisite legal basis for any further action by any governmental agency.

For these reasons, we hereby request that this Request and Notice be placed on record, and made a part of the

permanent, official departmental and commission files in this matter; and that the document sent to us be sent to us be supplement with an Amended Order that either comports with the Circuit Court Writ and Order, or sets this purported NOTICE OF DISPOSITION/ORDER OF DISMISSAL aside, thereby recognizing, and recording, in the official file in this matter, that the dispositive language of the Writ and Order of Superintending Control has, in legal effect, become the *Final Order* of the Michigan Department of Civil Rights and/or Civil Rights Commission, as provided for in said Writ and Order of Superintending Control.

Because of the reference to the "EEOC", in the document recently mailed to us, we are forwarding a copy of this Request and Notice to the EEOC for appropriate filing there, as well.

Very truly yours,

CARR, STREET & GRUA

/s/ Cassius E. Street, Jr.
Cassius E. Street, Jr.

CES/jad
Enc.
cc: Jack Dykstra Ford, Inc.

APPENDIX #22

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Room 1540-Patrick V. McNamara Bldg.
477 Michigan Avenue
Detroit, Michigan 48226
Telephone 226-7636

IN REPLY REFER TO:
Charge No. 054-77-1825

Carolyn E. King
119 E. Kalamazoo
Apartment 3
Lansing, MI 48933

Charging Party

and

Jack Dykstra Ford, Inc.
3500 South Logan Street
Lansing, MI 48910

Respondent

RECD JAN 28 1986

DETERMINATION

Under the authority vested in me by the Commission's procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the finding of the Michigan Department of Civil Rights.

Having examined the findings and the record presented, I conclude that there is reasonable cause to believe the charge is true.

A review of the record presented indicates that the Agency was unsuccessful in its attempts to settle the matter.

In addition to the finding of sex discrimination, the Commission finds that reasonable cause exists to believe Respondent failed to hire Ms. King based on her race.

The Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. The parties may indicate their willingness to enter into settlement discussion by completing the enclosed invitation to conciliation and returning it to this office in the enclosed self-addressed envelope within 10 days of receipt of this letter.

/s/ Joseph S. Bennett
JOSEPH S. BENNETT, District Director (Acting)

Date: 24 JAN 1986
Enclosure: Invitation

APPENDIX ITEM #23

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, CIVIL ACTION NO.

vs. HONORABLE

JACK DYKSTRA FORD, INC., COMPLAINT
Defendant.

FILED
SEP 30 PM 3:11
ANNA DIGGS TAYLOR

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964 to correct unlawful employment practices on the basis of failing to hire Charging Party, Carol King as a car salesperson because of her race, black and her sex, female while it continued to seek applications from similarly qualified whites and males.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C Section 2000e, *et seq.* ("Title VII").

2. The unlawful employment practices alleged below were and are now being committed within the jurisdiction

of the United States District Court for the Eastern District of Michigan, Southern Division.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission (the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII, and is expressly authorized to bring this action by Section 706(f)(1) of Title VII, 42 U.S.C. Section 2000e-5(f)(1).

4. At all relevant times, Defendant, (the "Employer") has continuously been and is now a Michigan Corporation doing business in the State of Michigan and the City of Lansing, and has continuously had and does now have at least fifteen employees.

5. At all relevant times, Defendant has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

STATEMENT OF CLAIMS

6. More than thirty days prior to institution of this lawsuit, Carol King filed a charge with the Commission alleging violations of Title VII by Defendant Employer. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since at least December 15, 1976, the Defendant Employer has engaged in and is continuing to engage in unlawful employment practices at its Lansing, Michigan facility in violation of Section 703(a)(1) of Title VII, 42 U.S.C. Section 2000e-2(a)(1). The practices include failure to hire Carol King because of her race, black and sex, female.

8. The effect of the practices complained of above has been to deprive Carol King of equal employment opportunities and to otherwise adversely affect her status as an applicant for employment, because of her race and sex.

PRAYER FOR RELIEF

WHEREFORE, The Commission respectfully requests that this court:

A. GRANT a permanent injunction enjoining the Defendant Employer, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of race and sex.

B. ORDER the Defendant Employer to institute and carry out policies, practices and programs which provide equal employment opportunities for blacks and women, and which eradicate the effects of its past and present unlawful employment practices.

C. ORDER Defendant Employer to make Carol King whole by providing appropriate backpay with prejudgment interest, in amounts to be proved at trial, and other affirmative relief necessary to eradicate the effects of its unlawful practices, including but not limited to rightful-place hiring of the aggrieved individual.

D. GRANT such further relief as the Court deems necessary and proper.

E. AWARD the Commission its costs in this action.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

JOHNNY J. BUTLER
General Counsel (Acting)

PHILIP B. SKLOVER
Associate General Counsel

OFFICE OF GENERAL COUNSEL
Trial Services Division
2401 "E" Street, N.W.
Washington, D.C. 20507

/s/G.B. Manning
GLENN B. MANNING
Regional Attorney

MIMI M. GENDREAU
Trial Attorney

DETROIT DISTRICT OFFICE
Patrick V. McNamara Bldg.
477 Michigan Avenue, Suite 1540

Telephone: 313/226-7636

Date: Sept. 30, 1986

APPENDIX ITEM #24

STATE COURT ACTION DISMISSED WITH NO DECISION ON THE MERITS—When a charge is filed with EEOC after a state court action raising the same claim or the same issues has been dismissed with no decision on the merits, the EOS should ask the Regional Attorney to determine whether the judgment would be given preclusive effect under the law of the state from which the judgment emerged. Commission Decision No. 85-14, CCH Employment Practices Guide, Paragraph 6855.

Generally, for a state court judgment to operate as a bar to subsequent suit on the same claim or raising the same issues, it must have been a final decision on the merits of the case. *F.T.C. v. Food Town Store, Inc.*, 547 F.2d. 247 (4th Cir. 1977); *Central R.R. Co. of N.J. v. Need*, 26 N.J. 172, 139 A.2d. 110, *cert. denied*, 357 U.S. 928 (1958). A dismissal for lack of subject matter or personal jurisdiction or a dismissal for failure to prosecute would generally not be considered a final judgment on the merits. However, state law must always be examined to determine whether the decision would be considered a final one on the merits and whether that decision would be given preclusive effect.

(SEE CCH Page 6045-3, Volume 2 (New Developments)) Par. 5038

ENVELOPE

DATED: MAR 2 1987
U.S. POSTAL SERVICE

C.E. STREET, JR.
CARR, STREET & GRUA
2401 E. GRAND RIVER AVE.
LANSING, 48912
MI

APPENDIX ITEM #25

STATE OF MICHIGAN
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, Civil Action #G87-33-CA5

-vs- JUDGE: ROBERT HOLME S BELL

JACK DYKSTRA FORD, INC.,

Defendant.

Mimi M. Gendreau P-37824
Trail Attorney
Equal Employment Opportunity Commission
1540 Patrick V. McNamara Bldg.
477 Michigan Ave.
Detroit, Mich. 48226
Phone: 1-313-226-4643

Cassius E. Street, Jr. P-21087
Attorney for Defendant
BUSINESS ADDRESS:
2401 E. Grand River Ave.
Lansing, Mich. 48912
Phone: 1-517-487-8300

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF MICHIGAN)
) SS.
COUNTY OF INGHAM)

CASSIUS E. STREET, JR., being first duly sworn, deposes and says that he is the attorney for the above-named Defendant; further, that he has read the attached Motion for Rehearing-Reconsideration and to Amend, by him subscribed, and knows the contents thereof, and that the same is true to the best of his knowledge and belief, except as to those matters, if any, therein stated to be upon information and belief, and as to those matters, he believes them to be true.

Further, that if sworn as a witness, he could testify competently to the facts contained herein, and within said Motion, as he knows them to be true.

Further, Deponent says that sometime substantially after Defendant filed and submitted its Motion to Dismiss and/or for Summary Judgment, and Briefs in support thereof, completely unsolicited, and without any knowledge on Affiant's part as to who sent it, Affiant received, at his office, in a hand-addressed envelope, with no return address, and without any identification of any kind as to who had sent the same, seven printed pages, a copy of which is attached to the accompanying Motion and marked as Exhibit A, including the first page thereof, which is obviously a page out of EEOC's in-house manual of operating procedures which sets forth self-imposed Rules, Regulations and Procedural Standards and Safeguards binding upon Plaintiff, EEOC, as to when, it could lawfully and properly commence Federal litigation against a Defendant, and where it could not, where a prior state court action had been dismissed under circumstances where the dismissal came before completion of a full evidentiary hearing on the merits of the claim of discrimination.

It is clear, under the facts and circumstances of this case, that there has been a violation of Plaintiff's self-imposed Rule, Regulation and Procedural Standard and Safeguard, since the Order in question would clearly be given preclusive effect under the law of the state from

which it emerged, since, under Michigan law, the Decision must be considered a final one "on the merits", which would be given preclusive effect. Since the action against Defendant here, in violation of this Rule, Regulation and Procedural Standard and Safeguard is one, therefore, that should be dismissed because prohibited thereby, Affiant verily believes that this newly-discovered evidence, binding upon Plaintiff, does require a different result. It serves, therefore, as the basis for a Rehearing-Reconsideration and reversal of the Court's prior Order.

With regard to the prejudice against Defendant resulting from the fact that, with the passage of time, without diligent action by Plaintiff, it is severely handicapped in being able to establish, by getting statements from all of its prior applicants and employees, and being able to furnish copies of all such application and employment documents, that there was no pattern of discrimination such as alleged by Plaintiff in this case. On information and belief, Affiant states that this would involve approximately 500 employees and approximately 1,000 applicants, and their files, relating to their applications for employment, and employment status, many of which employees are no longer living in the area, and most of which Defendant does not have information as to their current whereabouts. While the State proceedings were pending, Defendant endeavored to keep track of such information and material, but when it was concluded, on the belief that there would be no further need to monitor and preserve such information and material, no special efforts were made to maintain the same. Accordingly, it would be an extremely burdensome matter, in terms of time, effort, resource and expense, to endeavor to re-create and re-gather that information and material at this time and much of it may no longer be able to be obtained.

Because of the premature, "false-start" by EEOC (later "rescinded"), before the final Order of Dismissal was entered, and the timing of the EEOC's mailing and actions

that followed; and, the fact that upon Affiant's personal examination of *all* of MDCR's files and records pertaining to this matter, after action was commenced by EEOC against Defendant, pursuant to a formal FOI demand, the entire file covering the time period when the final Order of Dismissal was in the process of being entered, related to contacts between MDCR and EEOC pertaining to such entry, was "lost/"missing", a concerted, cooperative effort, and conspiracy between EEOC and MDRC, to deprive Defendant of its rights, has been established.

The Court's Opinion and Order dated October 2, 1987 was not received by Affiant until the U.S. Mails were received in AFfiant's office, in the regular course of business, on Thursday, October 8, 1987.

/s/ Cassius E. Street, Jr.
Cassius E. Street, Jr.

Subscribed and sworn to before me
this 13th day of October A.D., 1987.

/s/ Jacqueline A. Harkness
Jacqueline A. Harkness
Notary Public, Shiawassee
Acting in Ingham County, Michigan
My Commission Expires: September 9, 1991

APPENDIX ITEM #26

No. 86-5450

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MOTILAL MAURYA,
Plaintiff-Appellant,
v.
PEABODY COAL COMPANY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed July 2, 1987

Before: ENGEL, KRUPANSKY and GUY, Circuit Judges.

GUY, Circuit Judge, delivered the opinion of the court, in which KRUPANSKY, Circuit Judge, joined. ENGEL, Circuit Judge, (pp. 7-10) delivered a separate dissenting opinion.

GUY, Circuit Judge. Plaintiff appeals from a summary judgment granted in favor of defendant dismissing his Title VII employment discrimination suit on the ground of *res judicata*. Our analysis of this litigation differs from that of both the district court and the parties, and, as explained herein, requires us to reverse.

I.

Maurya was terminated from his position with Peabody

on October 12, 1977, after working for that company since 1975.[1] Maurya was a native of India, having come to the United States in 1968. Maurya alleged that the termination was because of his national origin.

On March 20, 1978, Maurya filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC). This complaint was filed 158 days after his termination. On May 2, 1978, plaintiff filed a complaint with the Kentucky Commission for Human Rights (KCHR). This complaint was filed 200 days after termination of plaintiff's employment.[2]

The KCHR held a hearing and on September 20, 1979, issued an order determining that Maurya was discharged by Peabody because of his national origin in violation of Ky. Rev. Stat. 344.040. The KCHR did not order reinstatement or back pay, however, because they also found that Maurya had not exercised "reasonable diligence" in seeking other employment. On October 1, 1979, Maurya filed a motion with the KCHR to renew the proceedings for the purpose of granting back pay and reinstatement.

On October 15, 1979, Peabody appealed the KCHR decision to the Hopkins Circuit Court. On October 17, 1979, the KCHR granted Maurya's motion to reopen and ordered immediate reinstatement. Maurya then filed his own circuit court suit challenging the KCHR's denial of back pay. On October 25, 1979, Peabody filed a second appeal seeking review of the amended KCHR order which granted reinstatement. All of these appeals were ultimately consolidated.

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[1]There is some dispute as to the actual date of termination, but we use October 12, 1977, because that is the earliest date that termination could be possible.

[2]Plaintiff makes the unsupported allegation that he actually went to the KCHR in February of 1978. We need not resolve this claim, however, due to the conclusion we arrive at in these proceedings.

Prior to a decision by the Hopkins Circuit Court, the EEOC, on January 24, 1980, issued a Right to Sue letter to Maurya, and on April 16, 1980, Maurya filed this action in the District Court for the Western District of Kentucky.

On May 27, 1981, the Hopkins Circuit Court issued a judgment setting aside the two KCHR orders. Both orders were set aside because the court determined that Maurya had failed to file a complaint with the KCHR within 180 days of the alleged unlawful termination as is required by the applicable Kentucky statute. Ky. Rev. Stat. 334.200(1). On March 12, 1982, the Kentucky Court of Appeals affirmed the decision of the Hopkins Circuit Court, and on December 7, 1982, the Kentucky Supreme Court denied discretionary review.

After the Kentucky court proceedings were completed, Peabody filed for summary judgment in this case on the grounds of *res judicata*. On March 24, 1986, Peabody's motion was granted on the basis of the Kentucky judgment being *res judicata* of the issues presented for review in the federal Title VII action.

II.

On appeal both sides devote their arguments solely to whether this was an appropriate fact situation for the application of the principle of *res judicata*.[3] Although we conclude that the Kentucky court's determination that Maurya's complaint was not timely filed with the KCHR is binding on us, we find that this begins the inquiry rather than ends it.

Title VII provides that if a claimant alleges employment

---

[3]There is no doubt that in appropriate circumstances a federal court will give preclusive effect to a decision of a state court which reviews a state administrative agency's determination of an employment discrimination claim. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

discrimination in a state that has a state agency which can provide a remedy for such discrimination, the claimant cannot file with the EEOC until 60 days after he begins a proceeding before the state agency, unless the state proceedings terminate before the expiration of the 60 days. 42 U.S.C. § 2000e-5(c). Kentucky is such a "deferral state" as a result of its establishment of the KCHR. In deferral states a claimant who files a claim with the state agency is given 300 days to file his claim with the EEOC. 42 U.S.C. § 2000e-5(e); *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980).

In commenting on these Title VII requirements, the Seventh Circuit recently stated:

> The combined effect of sections 2000e-5(c) and (e) is to require the victim of alleged discrimination to file charges with a state agency if he is in a deferral state, and to do so at least 60 days before the 300th day after the alleged discrimination occurred, for if he files later he will not be able to file a charge with the EEOC by the 300th day unless the state agency obligingly terminates the proceeding before then.

Martinez v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 1371, 772 F.2d 348, 350 (7th Cir. 1985).

When Maurya filed his complaint with the EEOC, he would have been well within the 300-day requirement except for the fact that since he had not previously filed with the KCHR, his filing with the EEOC was ineffective until 60 days after he filed with the KCHR. This 60-day period did not begin to run until he did file with the KCHR on May 2, 1978. Thus, the effective date of the EEOC filing would be July 2, 1978, unless the KCHR terminated proceedings sooner than 60 days. Unlike the plaintiff in *Mohasco*, however, the July date presents no problem for Maurya because it only takes him to the 260th day of his 300-day filing period. The interesting question that this chronology does raise, however, is whether

Maurya had 300 days to file with the EEOC in light of his failure to make a *timely* filing with the KCHR. Although the Supreme Court has never squarely ruled on this issue, they did indicate, at least in dictum in *Mohasco*, that a timely filing is not required. *See Mohasco*, 447 U.S. at 816 n.19.[4] More importantly, however, this circuit has specifically addressed the issue in at least two cases and has squarely concluded that a timely state filing is not required to give a claimant the benefit of the 300-day filing period with the EEOC. In a case arising in the Western District of Kentucky and involving the same Kentucky statutes and procedures we deal with here, we stated, "We therefore find that plaintiff Jones' action is not barred for failure to commence proceedings with the KCHR in a timely fashion under state law." *Jones v. Airco Carbide Chemical Co.*, 691 F.2d 1200, 1204 (6th Cir. 1982). Referencing *Jones*, we later held in *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984):

> Accordingly, we hold that deferral state claimants are not required to make a timely filing with the state agency before the federal 300 day filing period applies. All that is required is that a filing with the state agency be made with sufficient time to allow an effective filing with the EEOC within 300 days after the discriminatory act.

714 F.2d at 622.

The cases decided in this circuit reached this conclusion by making an analogy to the Supreme Court's decision in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), a case involving not Title VII but the Age Discrimination in Employment Act of 1967. Although one may question, as did

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[4]For an interesting discussion of the reason why a timely filing should be required, see Judge Posner's opinion in *Martinez v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 1373*, 772 F.2d 348 (7th Cir. 1985).

Judge Posner in *Martinez*,[5] the wisdom of this rule as well as the *Oscar Mayer* analogy, this panel is not free to do so as we are bound by *Jones* and *Rasimas*.[6]

In conclusion, then, we hold that Maurya made a timely filing within 300 days with the EEOC and that he is not penalized for failure to timely file with the KCHR. We do give preclusive effect to the Kentucky court's determination that Maurya did not timely file with the KCHR,[7] but find that this does not divest the district court below of jurisdiction, and thus we REVERSE and REMAND for further proceedings.[8]

---

[5]*See supra* note 4.

[6]In neither *Jones* nor *Rasimas* were there state court proceedings. However, this difference is not meaningful since all that the state court proceedings here determined was that Maurya had not filed a timely petition before the state agency—a fact that was acknowledged in both *Jones* and *Rasimas*.

[7]As he did in the court below, plaintiff continues to argue that he, in fact, made a timely filing with the KCHR. On this issue there is complete preclusion as a result of the action of the Kentucky state courts.

[8]Had plaintiff's state court action not been procedurally barred by his untimely filing with the KCHR, he could have suffered *claim* preclusion even if he had not specifically asserted his federal claim. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). However, since plaintiff's access to the Kentucky courts was barred by his failure to first make a timely administrative filing, he had no opportunity to present his national origin discrimination claim. Under such circumstances, principles of res judicata are not applicable. *Whitfield v. City of Knoxville*, 756 F.2d 455 (6th Cir. 1985).

ENGEL, Circuit Judge. I respectfully dissent. My disagreement with the majority stems wholly from a difference in analysis of the question to be decided. If, as the majority suggests, the sole issue is one of timeliness, then surely the majority is right in holding that the timely filing with the state agency in a deferral state is not a jurisdictional prerequisite to filing a complaint before the EEOC. Likewise the majority would be correct in allowing a subsequent suit in federal district court under Title VII provided the claimant filed his complaint with the EEOC within the 300 days specified by statute. 42 U.S.C § 2000e-5(e). Because plaintiff's complaint was filed 158 days after his termination the majority correctly holds that the EEOC and the district court had jurisdiction over his claim notwithstanding his untimely filing before the Kentucky Commission for Human Rights (KCHR). *Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 620 (6th Cir. 1983). In reaching the conclusion that the state court proceedings had no further significance in this litigation, however, the majority introduces into this appeal an issue which was raised by neither party nor by the district court. To the district court, to the parties, and to me the question is not one of timeliness before the EEOC under *Rasimas*, 714 F.2d at 622. The issue rather is wheather the state court proceedings under the circumstances here operate as *res judicata* to bar further federal proceedings even though the ultimate judgment in the state proceedings was itself based upon a determination of untimeliness. The majority errs in disposing of this appeal on a ground not raised by the parties and not determinative of this court's jurisdiction since timeliness is not a jurisdictional question. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982). It also errs in its failure to to recognize the preclusive effects of the state court dismissal of Maurya's claim.

Underlying this case is the classic aphorism that hard cases make bad law. In a rather unexpected turn of events, a plaintiff who thought he had been successful on the merits and who was quite content to rely upon the administrative deter-

mination that his employer was guilty of discrimination, instead found that determination vacated and nullified by an adverse state court judgment based solely on his untimely filing before the KCHR. A defense of the dismissal ordered by the district court here and compelled in my view by case law is indeed difficult, but no more so than any case in which the merits are blocked by a procedural requirement.

The majority at least pays lip service to the principles of *res judicata* in footnotes 3, 6 and 8, and thus presumably it would not quarrel with the Supreme Court's holdings in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), and our circuit's holding in *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978). My point of difference with the majority concerns the importance accorded plaintiff's having done considerably more than file what was ultimately determined to be an untimely claim with the KCHR—plaintiff voluntarily proceeded to state court. No provision of Title VII requires a plaintiff to pursue in state court review of administrative action, but neither Title VII nor Supreme Court precedent "indicate[s] that the final judgment of a state *court* is subject to redetermination." *Kremer*, 456 U.S. at 469-70 (emphasis in original). Although Maurya obtained a generally favorable decision from the KCHR on the question of discrimination, he also appealed its order to the Ohio [County] Circuit Court, where he challenged the Commission's determination that he was entitled to reinstatement only and not to back pay. His employer cross-appealed, asserting that the action should he dismissed altogether because not timely under Kentucky law.

The state court judgment, to which the district judge gave preclusive effect, is therefore a judgment dismissing Maurya's claim because it was not timely filed and not because it lacked merit. Nonetheless, under Kentucky law as found by Judge Johnstone and not seriously disputed by the parties, as well as under the law of our circuit, the termination of such litiga-

tion for being untimely acts as a determination on the merits and is therefore entitled to preclusive effect under 28 U.S.C. § 1738. Judge Johnstone correctly examined the legal significance of the state court dismissal and concluded that it barred continuation of the federal suit:

> Pursuant to Rule 41.01 [of the Kentucky Rules of Civil Procedure], a voluntary dismissal, whether by the plaintiff, by stipulation or by order of the court, constitutes a dismissal without prejudice. An involuntary dismissal, however, (other than one for lack of jurisdiction, improper venue, or failure to join a party) "operates as an adjudication upon the merits" and constitutes a dismissal with prejudice. Ky. R. Civ. P. 41.02(3). Dismissal of an action with prejudice precludes another action on the same matter. *Polk v. Wimsatt*, 689 S.W.2d 363, 365 (Ky. App. 1985). The Final Judgment of the Hopkins Circuit Court ordered dismissal of Maurya's KCHR complaint *with prejudice*. Under Kentucky law, that judgment operates as a preclusive adjudication on the merits.

This case is unlike *Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550 (6th Cir. 1983), *aff'd on other grounds*, 470 U.S. 532 (1985), in which this court refused to grant preclusive effect to an Ohio state court dismissal of an appeal from an adverse administrative ruling. Ohio courts treat a failure to file a timely notice of appeal as a jurisdictional bar and not as an adjudication on the merits. In contrast, Kentucky expressly models its employment discrimination law on Title VII; the Kentucky court's direction to dismiss Maurya's claim "with prejudice" for untimeliness and not for lack of jurisdiction accords with *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982), in which the Supreme Court held that filing a timely charge of discirmination with the EEOC was not a jurisdictional prerequisite. The majority attempts to disregard the state court action on the basis that it was proce-

durally barred by the untimely filing before the KCHR. Neither the parties' arguments nor Kentucky law supports that view.

The proposition is well entrenched both in Kentucky and in federal law that Maurya is now precluded from pursuing his federal claim since he initiated his litigation in the Kentucky courts and could have achieved the benefit of a successful result which would have been binding upon his employer. Altough Maurya's initial resort to the KCHR could not deprive him of his right to a federal trial on his Title VII claim, this does not mean that the state court judgment can be disregarded. *Kremer*, 456 U.S. at 477-78. Section 1738 of Title 28, as interpreted in *Kremer*, requires us to treat the adverse state court judgment, though itself based upon an issue of timeliness, as *res judicata*.

I would accordingly AFFIRM the judgment of the district court.

APPENDIX ITEM #27

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Michigan Civil Rights Commission and
Michigan Department of Civil Rights

RULES

governing organization, practice
and procedure, including relevant
portions of the Michigan Constitution

State of Michigan
DEPARTMENT OF CIVIL RIGHTS
125 West Allegan Street
Lansing, Michigan 48913

BACK OF COVER PAGE COPY

RECEIVED

AUG 24 1983

ANDERSON CARR & STREET

Reprinted October, 1979, by Michigan Department of Civil Rights

I hereby certify that the attached Rules of the Michigan Civil Rights Commission and Michigan Department of Civil Rights, entitled, "Organization, Practice and Procedure", being R 37.2 to R 37.27, were adopted by the Michigan Civil Rights Commission at a meeting held on September 24, 1979, at Detroit, Michigan, under the authority granted to the Michigan Civil Rights Commission by the Michigan Constitution of 1964, Article 5, Section 29, and by Section 601(f) of P. A. 453 of 1976, as amended.

CATHERINE C. BLACKWELL
Vice Chairperson
Michigan Civil Rights Commission

Dated: September 24, 1979

CIVIL RIGHTS COMMISSION
DEPARTMENT OF CIVIL RIGHTS

ORGANIZATION, PRACTICE AND PROCEDURE*

(By authority conferred on the Civil Rights Commission by section 29 of Article V of the state constitution.)

R 37.1. Civil rights within commission jurisdiction.

Rule 1. The civil rights within the jurisdiction of the commission shall be those guaranteed by law and the constitution including, but not limited to, the areas of equal protection of the laws, employment, education, housing, and public accommodations. The jurisdiction of the commission shall not be limited to the processing of complaints.

HISTORY: 1954 ACS 44, p. 5; 1954 ACS 50, p. 5.

* These rules were filed with the Secretary of State on October 2, 1979, and take effect October 17, 1979.

R 37.2. Definitions.

Rule 2. As used in these rules:

(a) "Chairperson" means the duly appointed or elected chairperson or a co-chairperson of the civil rights commission or, in the event of his or her or their absence, the acting chairperson designated by the remaining members of the commission.

(b) *"Charge"* means that document or pleading authorized by the department which initiates a contested case hearing under rule 12.

(c) "Claimant" means any person who files a complaint or applies to the department for the issuance of a charge.

(d) "Commission" means the state civil rights commission created by Article 5, §29 of the Michigan constitution.

(e) "Commissioner" means any member of the civil rights commission.

(f) "Constitution" means the constitution of the state of Michigan.

(g) "Department" means the department of civil rights established by section 475 of Act No. 380 of the Public Acts of 1965, as amended, being §16.575 of the Michigan Compiled Laws.

(h) "Department investigator" means a member, agent, or employee of the department designated or delegated by the director to make an investigation.

(i) "Director" means the director of the department of civil rights engaged by the commission.

(j) "Hearing commissioner" means a commissioner designated by the chairperson or the commission to conduct a hearing.

(k) "Hearing referee" means an agent of the commission designated or delegated by the chairperson or the director to conduct a hearing.

(l) "Party" or "parties" means the claimant or the respondent, or both, and the commission or department, or both, where appropriate.

(m) "Person" means an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency thereof, or any other legal or commercial entity.

(n) "Respondent" means any person against whom the claimant has complained, or against whom the department has issued a charge.

R 37.3. Commission; election and tenure of officers; quorum; voting.

Rule 3. (1) The commission, each January shall elect from its members by a majority vote of the commission a chairperson or co-chairpersons and such other officers as the commission shall determine, who shall serve during the balance of the calendar year and until their successors have been duly elected and qualified.

(2) A majority of all members of the commission shall constitute a quorum. A majority of all the members shall be required to decide matters of a nonministerial nature, but a majority of a quorum may decide ministerial matters. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.

R 37.4. Complaints.

Rule 4. (1) Any person claiming to be aggrieved by unlawful discrimination may be himself or herself or his or her counsel of other agent make, sign, and file with the department a complaint. Assistance in drafting and filing complaints shall be available, without charge, to claimants at all department offices.

(2) Any commissioner, the director, or agent authorized by the commission or director, may initiate, make, sign, and file a complaint.

(3) A complaint shall be in writing, The original being signed and verified before a notary public or other person duly authorized by law to administer oaths and take acknowledgements. Notarial service shall be furnished without charge by the department.

(4) The complaint shall include the following:

(a) The full name and address of the claimant and his or her agent, it any.

(b) the full name and address of the respondent.

(c) the alleged discrimination and a statement of the particulars thereof.

(d) The date or dates of the alleged discrimination, whether the alleged discrimination is of a continuing nature, and the dates between which the continuing discrimination is alleged to have occurred.

(e) A statement as to any other proceeding, civil or criminal, based upon the same facts, occurrences or transactions as alleged in the complaint, together with a statement as to the status or disposition of the other action. Where such a proceeding is pending, the commission or department may, in its discretion, delay consideration or action on the complaint filed.

(5) The complaint shall be filed with the department at 1 of its offices.

(6) The complaint shall be filed within 180 days from the date of the occurrence of the alleged discrimination, or within 180 days of the date when the occurrence of the alleged discrimination was or should have been discovered. If the alleged discrimination is of a continuing nature, the date of the occurrence of the discrimination

shall be deemed to be any date subsequent to the commencement of the discrimination up to and including the date upon which the discrimination shall have ceased.

(7) The complaint may be filed by personal delivery or by mail addressed to 1 of the department's offices.

(8) Complaint forms may be obtained at any of the offices of the department.

(9) A copy of the complaint filed by the claimant shall be delivered or mailed to the respondent.

(10) The department may require answers to interrogatories, order the submission of books, papers, records, and other materials pertinent to a complaint, and require the attendance of witnesses, administer oaths, take testimony, and compel, through court authorization, compliance with its orders or an order of the commission.

(11) A complaint, or any part thereof, may be withdrawn only on written consent of the commission or department upon such conditions as shall be deemed proper in the circumstances.

R 375.5. Conference and conciliation.

Rule 5. (1) The respondent may be invited, at any time, to participate in a conference and conciliation in an endeavor to eliminate the alleged discrimination, and shall be invited to participate in such a conference prior to the issuance of a charge.

(2) The members of the commission and the department staff shall not disclose what has transpired in the course of such endeavors at conference and conciliation.

(3) If the department shall succeed in its endeavors at conference and conciliation, it shall mark the case accordingly and notify the parties by registered or certified mail, return receipt requested? of the terms of conciliation.

R 37.6. Charge; issuance; refusal to issue.

Rule 6. (1) If, after investigation, the department determines that there are sufficient grounds therefor, a charge shall be issued.

(2) If the department determines that there are insufficient grounds therefor, it shall refuse to issue a charge and shall notify the parties by registered or certified mail, return receipt requested, of the determination and of the refusal, together with the reasons therefor, and of the claimant's right to request reconsideration by the department of the determination within 30 days from the date of mailing, in accordance with rule 7.

R 37.7. Reconsideration of refusal to issue charge; request; hearing.

Rule 7. (1) A claimant may request of the department a reconsideration of its refusal to issue a charge. The request shall be in writing, state specifically the grounds upon which it is based, and be filed with in 30 days after the date of mailing of the notice of disposition of which reconsideration is requested. It shall be filed at any office of the department by personal delivery or by mail.

(2) The department may authorize a hearing on the request for reconsideration at such time and place and before such hearing commissioner or commissioners or hearing referee or referees as it or the director may determine, and notice thereof shall be given to all parties to the proceedings. The parties may appear in person or by counsel, may present witnesses and testimony, and examine and cross-examine witnesses. Verbatim stenographic notes of the proceedings shall be made and kept by a competent reporter. The hearing commissioner or commissioners or hearing referee or referees shall report to the commission on such proceedings. The commission shall make a determination as to whether the department shall further consider the matter, and notify all parties by reg-

istered or certified mail, return receipt requested, and shall issue instructions for appropriate action based upon such determination.

R 37.8. Charge; form and content.

Rule 8. The charge shall be in writing, in such form and content as the department determines.

R 37.9. charge; amendment.

Rule 9. The commission on its own motion, on motion of the department, or on motion of the claimant may amend a charge at any time prior to issuance of an order based on the charge.

R 37.10. Charge; service.

Rule 10. Copies of the charge or amended charge shall be delivered or sent by certified or registered mail, return receipt requested, to the parties together with notice to the respondent to answer the charge as provided in rule 11.

R 37.11. Answer.

Rule 11. (1) The respondent shall file a written verified answer within 20 days from the date of service of the charge.

(2) The answer shall be filed in duplicate at any office of the department. The filing shall be by personal delivery, or by registered or certified mail, return receipt requested.

(3) Upon request, the commission or director may, for good cause shown, extend the time within which the answer may be filed.

(4) The answer shall be in writing, the original being signed and verified by the respondent. The answer shall contain the post office address of the respondent, and if he or she is represented by counsel, the name and post office address of counsel. The answer shall contain a gen-

eral or specific denial or admission of each and every allegation of the charge, or a denial of any knowledge or information sufficient to form a belief, and a statement of any matter constituting a defense. Any allegation in the charge which is not denied or admitted in the answer, unless the respondent shall state in the answer that he or she is without knowledge or information sufficient to form a belief, shall be deemed admitted.

(5) The respondent shall have the right reasonably and fairly to amend his or her answer.

(a) The respondent's right to amend his or her answer may be exercised at any time up to 10 days before the first hearing, without permission, and thereafter, in the discretion of the hearing commissioner or commissioners, or hearing referee or referees, on application only made thereof.

(b) Duplicate copies of an amended answer shall be filed with the department.

(6) If an answer is not filed within the time provided for in these rules, each of the allegations in the charge shall be deemed admitted. Upon application the referee, for good cause shown, may set aside the admission.

(7) The department within 5 days after the date of filing an answer or amended answer shall send a copy thereof by registered or certified mail, return receipt requested, to the claimant at his or her last known place of residence or to his or her counsel.

R 37.12. Hearing.

Rule 12. (1) Upon or after the issuance and service of a charge, the commission or director may schedule and summon the parties to a hearing thereon. The commission may at any time schedule and conduct a hearing with respect to any matter which in the judgment of the commission may involve unlawful discrimination and may war-

rant investigation by the commission, regardless of whether a charge or a complaint therefor shall have been filed by or with the department.

(2) Notice of the time and place of the hearing shall be mailed or delivered to the parties not less than 20 days prior to the date of the hearing. Upon good cause shown, the commission or director may order a hearing upon shorter notice. However, notice of the time and place of hearing shall be mailed or delivered to the parties not less than 7 days prior to the date of the hearing, unless such notice is waived by each party.

(3) A hearing shall be conducted by 1 or more hearing commissioners, or 1 or more hearing referees, or any combination of hearing commissioners or referees which hearing commissioners or referees shall hear the evidence and report thereon to the commission.

(4) Unless Waived by the hearing commissioners or the hearing referees, the claimant shall be present at the hearing. the respondent may appear at the hearing in person or by counsel, examine and cross-examine witnesses and, if an answer has been filed, may submit oral testimony and other evidence in support of the answer.

(5) Hearings shall be held at a place designated by the commission or director having due regard for the convenience of the parties and witnesses.

(6) The case in support of the charge shall be presented at the hearing by the department's counsel or by a member of the department's staff, or upon notice from claimant, by the claimant or his or her counsel, subject, however, to the right of the department to present other or additional evidence or argument.

(7) Hearing commissioners or referees Shall have full authority to control the procedure of the hearing, to admit or exclude testimony or other evidence without regard to

strict rules of evidence, and to rule upon all motions and objections.

(a) On their own motion, or at the request of a party, the hearing commissioners or referees shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The hearing commissioners or referees shall not exclude a party, an individual designated by a party as its representative, or a person whose presence is shown by a party to be essential to the party's presentation of his or her position.

(b) Hearing commissioners or referees may examine witnesses, and direct the production of papers or other evidence.

(c) Oral testimony shall be given under oath or affirmation and verbatim stenographic notes of the hearing shall be made and kept by a competent reporter. Transcripts shall be kept and, prior to the issuance of a final order, shall be available to the commissioners and hearing referees; parties may obtain transcripts by making suitable arrangements with the reporters and the department shall not be responsible for providing transcripts to the parties prior to issuance of final orders.

(d) Where hearings are conducted by 3 or more commissioners or referees, all rulings and determinations shall be made by majority rule.

(e) Evidence of the department's endeavors at conciliation shall not be admissible at the hearing.

(8) Hearing commissioners or referees or a party may request a prehearing conference which the hearing commissioner or referee may schedule, subject to objection by any party. Such prehearing conference may be held to obtain admissions, stipulations as to fact and law, agreement on the issues, and to determine the authenticity of documents. Written stipulations may be introduced in evidence if signed by each person sought to be bound thereby,

or by his or her counsel. Oral stipulations may be made on the record at open hearing.

(9) Hearing commissioners or referees may continue a hearing from day to day, or adjourn it to a later date, or to a different place by announcement thereof at the hearing, or by appropriate notice to all parties.

(10) Hearing commissioners or referees shall permit the parties or their counsel, or the member of the department's staff presenting the case in support of the charge, and may permit interveners, to argue orally before them and to file briefs within such time limits as the hearing commissioners or referees may determine.

(11) Hearing commissioners or referees may exclude from the hearing room or from further participation in the proceeding any person who engages in improper conduct before them, except a party, his or her counsel, or a witness engaged in testifying, each of whom shall be subject to appropriate disciplinary action by the commission.

(12) Hearings shall be open to the public, unless the commission or referee shall otherwise determine.

(13) Any motion filed by a party subsequent to the issuance of a charge and prior to hearing, shall be referred to the hearing commissioners or referees for decision. The hearing commissioners or referees may request briefs or schedule oral arguments, or both, as they deem necessary, and, where appropriate, they may reserve their ruling until the conclusion of the hearing. All rulings upon motions shall be included in the report of the hearing commissioners or referees to the commission.

(14) A party may submit, or the hearing commissioners or referees may request proposed findings of fact, proposed conclusions of law, and proposed orders at the conclusion of the hearing. All such proposals shall be submitted

to the commission with the report of the hearing commissioners or referees.

R 37.13. Service of documents upon counsel.

Rule 13. If counsel has appeared in writing on behalf of a party, a copy of any notice, pleading, or other document required to be sent to a party under these rules shall be mailed to counsel instead of the party, unless there is a written request from the party or counsel that a copy be mailed to the party also.

R 37.14. Orders to submit pertinent material and require attendance of witnesses; other powers; cost of service; witness and mileage fees.

rule 14. (1) At the instance of a party or on its own behalf, the commission or the department may order the submission of books, papers, records, and other pertinent material, and require the attendance of witnesses administer oaths, take testimony and receive evidence, and compel, through court authorization, compliance with its orders.

(2) Where an order is issued at the instance of a party to the inquiry or proceedings, other than the commission or a member thereof, or the department, the cost of service and witness and mileage fees shall be borne by the party at whose instance it has been requested and issued. When an order is issued at the instance of the commission, or a member thereof, or the department, the cost of such service and witness and mileage fees shall be borne by the commission or department. Such witness and mileage fees shall be the same as are paid to witnesses in the circuit courts of the state of Michigan.

R 37.15. Depositions.

Rule 15. In accordance with the Michigan general court rules, the commission or any member thereof, or the director, on its own motion or on the application of 1 of the parties may take or cause to be taken depositions of witnesses residing within or without the state.

R 37.16. Order issued after hearing.

Rule 16. (1) An order of the commission issued after hearing shall set forth the findings of fact and the basis for its decision: Following a hearing conducted under rule 12, and prior to a final order, the commission shall transmit To the parties a copy of the report of the hearing commissioners or referees, and shall give parties an opportunity To file exceptions and present written arguments to the commission. The commission may permit oral argument prior to its final decision.

(2) If upon the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful discrimination, the commission shall state its findings of fact and may issue an order requiring such respondent to cease and desist from such unlawful discriminatory act and to take such affirmative action as the commission may deem appropriate, which may include reporting from time to time the manner and extent of compliance. If upon the evidence the commission shall find that a respondent has not engaged in unlawful discrimination? the commission shall state its findings of fact and shall issue an order dismissing the charge as to such respondent.

(3) Copies of orders shall be served upon parties, interveners, and their counsel by registered or certified mail, return receipt requested, or by such other means as are reasonably calculated to give actual notice, accompanied by a notice of the statutory right to judicial appeal.

(4) All orders issued after a hearing shall be filed with the director. Such orders shall be open to public inspection during regular office hours of the department.

(5) When deemed by the commission necessary to safeguard the interest of persons concerned and to prevent injustice, the commission at any time prior to or subsequent to the issuance of a charge may issue its own order or the commission or the department may apply to an

appropriate court for the issuance of an order, directed to or against any person or persons, enjoining or prohibiting any conduct or threat thereof which violates or jeopardizes any of the rights, of any person or persons, guaranteed by law or the constitution.

R 37.17. Reopening of proceedings.

Rule 17. The commission upon its own motion, or upon request of any party or intervener, whenever justice so requires, may at any time reopen any closed proceeding upon notice to all parties and interveners. The department may reopen any proceeding closed by the department in the same manner.

R 37.18. Appeals from order of commission.

Rule 18. Any party claiming to be aggrieved by a final order of the commission or the department, including without limitation a refusal to issue a charge, may appeal to the circuit court of the state of Michigan having jurisdiction provided by law within 30 days of the date of service of an appealable order.

R 37.19. Modification or setting aside of orders.

Rule 19. Until an appeal shall have been filed in a court, as provided in rule 18, the commission may, at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside in whole or in part any findings or order made by it.

R 37.20. Declaratory ruling.

Rule 20. (1) The commission, on petition of an interested person, may issue a declaratory ruling as to the applicability of a statute, regulation, or rule to an actual state of acts upon submission to the commission of each of the following:

(a) A clear and concise statement of the facts.

(b) A legal brief? memorandum, or other reference to legal authorities relied upon.

(2) The commission, if it determines it shall issue a declaratory ruling, shall furnish the person with a statement to that effect and set forth the time in which the commission shall issue the ruling. The commission shall not issue a declaratory ruling after a complaint has been filed with the department.

(3) A ruling shall contain the statement of facts upon which it is based? and the legal authority on which the commission relies. A ruling once issued is binding on the commission and the commission may not retroactively change the ruling, but nothing in this rule shall prohibit the commission from prospectively changing a ruling.

R 37.21. Rules; adoption; amendment or recision.

Rule 21. New rules may be adopted and any rule may be amended or rescinded by the commission at a regular or special meeting, provided that not less than 5 members are present and voting in favor of such amendment and notice thereof shall have been given to all members of the commission not less than 10 days before the meeting at which action is to be taken.

R 37.22. Rules; availability; construction.

Rule 22. (1) The rules of the commission shall be available to the public at all offices of the department.

(2) These rules shall be liberally construed to accomplish the purposes of the constitution and the policies of the commission.

R 37.23. Guidelines.

Rule 23. The commission may adopt interpretive or procedural guidelines, or both, at a regular or special meeting, if not less than 5 members are present and are voting in favor of such guidelines and notice thereof is given to all members of the commission not less than 10 days before the meeting at which action is to be taken. Guidelines may be amended or rescinded by the same procedure. the guide-

lines shall be available to the public at all offices of the department.

R 37.24. Record making and keeping; disclosure.

Rule 24. (1) Any person who wishes, for purposes not inconsistent with the constitution and statutes, to make any of the records prohibited by section 206 and 402(c) of Act No. 220 of the Public Acts of 1976 and sections 206 and 402(c) of Act No. 453 of the Public Acts of 1976, being §§37.1206, 37.1402(c), 37.2206 and 37.2402(c) of the Michigan Compiled Laws, may apply to the commission, stating the specific purpose, method of compilation, and disposition of such information. The commission may permit the making or keeping of such records for limited periods upon such application.

(2) A person subject to section 206 of Act No. 453 of the Public Acts of 1976 and section 206 of Act No. 220 of the Public Acts of 1976. Acts of 1976 and section 206 of Act No. 220 of the Public Acts of 1976, being §§37.2206 and 37.1206 of the Michigan Compiled Laws, shall, upon request of the department or commission, disclose information covered by the above sections and shall not thereby be in violation of those provisions. A person subject to the same sections may retain records and information previously and lawfully obtained from prospective employees, but may not disclose that information except as provided in this rule.

R 37.25. Exemption from particular section of act; bona fide occupational qualification.

Rule 25. (1) A person subject to article 2 of Act No. 453 of the Public Acts of 1976, being §37.2201 et seq. of the Michigan Compiled Laws, may apply to the commission for exemption from particular sections of article 2 of Act No. 453 of the Public Acts of 1976, being §37.2201 et seq. of the Michigan Compiled Laws, on the basis that religion, national origin, age, height, weight, or sex is a bona fide

occupational qualification. Applications may be obtained from, and may be submitted to, any office of the department, and the department shall transmit Them to the commission.

(2) The commission may direct the department to investigate any matter deemed relevant to such applications, and the applicant shall make available any and all records, documents, data, or other information requested by the department or commission. Failure to provide such information shall result in denial of the application.

(3) An exemption shall not be granted if the same facts and circumstances are at issue in a complaint pending before the department or commission. Upon a sufficient showing the commission may grant an exemption. The exemption may be later revoked by the commission if the commission obtains other or different information, but such revocations are prospective. Any person obtaining exemption shall notify the commission if and when the classification exempted is no longer utilized.

R 37.26. Agreement or memorandum of understanding with local human rights agency or commission.

Rule 26. With the approval of the commission, the department may enter into agreements or memoranda of understanding with local human rights agencies or commissions, where such agreements shall facilitate the purposes of the constitution and civil rights statutes administered by the department and the commission. The agreements may include certification for the investigation of deferred complaints.

R 37.27. Voluntary plans.

Rule 27. (1) Any person requesting approval of a plan in accordance with the provisions of sections 210 and 507 of Act No. 453 of the Public Acts of 1976, and sections 208, 403, and 507 of Act No. 220 of the Public Acts of 1976, being §§37.2210, 37.2507, 37.1208, 37.1403, and

37.1507 of the Michigan Compiled Laws, may submit the plan by filing it at any office of the department and requesting approval.

(2) The commission may direct the department to obtain such information as it deems necessary to approve or disapprove a plan. The person requesting approval shall make available all records or information requested, and such information shall be deemed confidential. Information required shall include, but shall not be limited to, all of the following:

(a) Verification that the person requesting approval is not subject to any federal or state court order covering any of the practices involved in the plan.

(b) A statement of all court or agency enforcement actions presently pending.

(c) A statement of any voluntary plans previously filed with other state or federal agencies.

(d) A statement of the purpose of the plan.

(3) The commission may, prior to approving or disapproving any plan, indicate to the person requesting approval areas needing improvement in the plan, and the commission may disapprove or refuse further consideration of any plan unless such improvements are made.

Michigan Civil Rights Commission

Following are the portions of the Revised Constitution of the State of Michigan, approved by the people on April 1, 1963, which pertain specifically to civil rights and to the creation of the Civil Rights Commission.

ARTICLE I
DECLARATION OF RIGHTS

Equal protection; discrimination.

Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment

of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

ARTICLE V
EXECUTIVE BRANCH

Civil rights commission; members, terms, duties, appropriation.

Sec. 29. There is hereby established a civil rights commission which shall consist of eight persons, not more than four of whom shall be members of the same political party, who shall be appointed by the governor, by and with the advice and consent of the Senate, for four-year terms not more than two of which shall expire in the same year. It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination. The legislature shall provide an annual appropriation for the effective operation of the commission.

Rules and regulations; hearings, orders.

The commission shall have power in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appropriate orders. The commission shall have other powers provided by law to carry out its purposes. Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.

Appeals.

Appeals from final orders of the commission, including cease and desist orders and refusals to issue complaints, shall be tried de novo before the circuit court having jurisdiction provided by law.

APPENDIX ITEM #28

CONTROLLING PORTION OF *KREMER*, SUPRA.

"Accordingly, the Federal Courts consistently applied res judicata and collateral estoppel to causes of action and issues decided by State Courts. * * * * Indeed, from Cromwell v County of Sac . . . to Federated Department Stores, Inc. v Moitie . . . this Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. * * * * Thus, invocation of res judicata and collateral estoppel 'relieve(s) parties of the cost and vexation of multiple lawsuits, conserve(s) judicial resources, and by preventing inconsistent decisions, encourage(s) reliance on adjudication'. * * * * When a State Court has adjudicated a claim or issue, these doctrines also serve to 'promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.

* * * * * * *

While our previous expressions of the requirement of a full and fair opportunity to litigate, have been in the context of collateral estoppel or issue preclusion, it is clear from what follows that invocation of res judicata or claim preclusion is subject to the same limitation.

The lower courts did not discuss whether it is the doctrine of res judicata or collateral estoppel that applies here. Section 1738 requires dismissal of petitioner's Title VII suit, whether his Title VII claim is precluded by the New York Judgment, or whether he is collaterally estopped by that judgment from complaining that Chemico had dis-

criminated against him. *Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes,* ***Nash County Brd. of Ed. v Biltmore, Co.*** 640 F 2d 484, 488 (CA 4) cert den, 454 US 878, 70 L Ed 2d 188, 102 S Ct 359 (1981). See also Restatement (Second) of Judgments, Sec 61 (1) (Tent Draft N. 5, March 20, 1978); Currie, Res Judicata; The Neglected Defense, 45 U Chi L Rev 317, 340-341 (1978). It may be that petitioner would be precluded under res judicata from pursuing a Title VII claim. *However, that may be, it is undebatable that petitioner is at least estopped from relitigating the issue of employment discrimination arising from the same events."*

Kremer, supra, Footnote 6, pp 466 - 467; Footnote 22, pp 481 - 482.

APPENDIX ITEM #29

CHRONOLOGY OF EVENTS

December 15, 1976–January 24, 1977	Dates of alleged acts of discrimination.
February 2, 1977	Carol E. King (hereafter "King") filed a "Complaint" with the Michigan Department of Civil Rights ("MDCR") (SEE: APPENDIX p. 12a-14a) alleging employment discrimination/failure to hire, on the basis of "sex", Under "Federal and/or State Civil Rights laws", and claimed the dates of such alleged discrimination as December 15, 1976 through January 24, 1977. This is the *only* such Complaint or claim of employment discrimination ever filed against Petitioner related to such alleged discrimination.
February 2, 1977	A copy of the "Complaint" (referred to as a "Charge", in the Federal enforcement process) was mailed, on the same day that it was filed, to the EEOC, and received by EEOC on February 15, 1977. (SEE: APPENDIX p. 15a). EEOC sent a copy of this "Complaint"/"Charge" to Petitioner on April 20, 1977. (SEE: APPENDIX p. 16a-17a).

November 15, 197	After investigation, MDCR found "*insufficient grounds*" (no reasonable cause) to believe King's claims were true, and informed her no "CHARGE" would be issued. King requested "reconsideration", and eventually a "CHARGE" was issued.
April 19, 1980	"MDCR Ex Rel: CAROL KING, Claimant" filed, and served on Petitioner, a "CHARGE" ("No. 1") (SEE: APPENDIX p. 18a-21a), alleging unlawful discriminated on account of *sex* and *race*, in violation of King's civil rights guaranteed by statutes and Constitutional provisions of *both* the State of Michigan and the United States. The relief sought included *injunctive relief* against the alleged discriminatory acts as to *King*, and *all other applicants* for employment, *King's reinstatement with back pay, and damages*, with such further relief as seemed just and equitable, the same relief sought by the EEOC in this subsequent Federal Court action.
April 25, 1980	Petitioner Answered said "CHARGE", denying, as untrue, all such allegations of unlawful discrimination; and, the matter proceeded to an evidentiary hearing on the merits before an MDCR Hearing Referee, that commenced in late 1980, and "continued over many days of extensive testimony" (SEE: APPENDIX p. 22a-23a).

November 25, 1980	During the course of said evidentiary hearing, near the close of Claimant's proofs, Petitioner filed a Motion for Summary and/or Accelerated Judgment because of Claimant's deliberate and repeated actions obstructing the orderly deliberation of the case, including violations of the Hearing Referee's orders granting Petitioners certain discovery rights, essential in order to properly prepare to defend the case.
March 18, 1981	The Motion was granted, and MDCR's "Complaint"/"Charge", on King's behalf, was dismissed, "without prejudice". (SEE: APPENDIX p. 22a-27a).
November 12, 1981	This Dismissal was reviewed by the State of Michigan, Ingham County Circuit Court (a trail court of unlimited jurisdiction), and on November 12, 1981, that Court entered a final Order, effective November 22, 1981, dismissing, "without prejudice", the "Complaint"/"Charge", dated and filed February 2, 1977, and the "CHARGE", issued by MDCR pursuant thereto, and the underlying claims of discrimination. (SEE: APPENDIX p. 28a-30a).
June 3, 1983	The final Order of the Circuit Court was appealed by MDCR to the Michigan Court of Appeals, and on June 3, 1983, that Court issued its Decision and Order, (SEE: APPENDIX p. 31a-36a) affirming the Circuit Court's Order dismissing the

"Complaint"/"Charge" and "CHARGE", "without prejudice" and with the direction that:

> "The Claimant (Carol King) remains free to *renew proceedings* on her charge of discrimination. Defendant (MDCR, et. al.) has not been deprived of all opportunity to represent the Claimant, should the latter see fit to *initiate new proceedings.*" (SEE: APPENDIX p. 36a).

(a) Neither King, nor the MDCR, endeavored to appeal this Decision to the Michigan Supreme Court, nor accomplish further review of that Decision by any other means available to them.

July 12, 1983

Without King, or the MDCR or EEOC on her behalf (despite both Agencies having the right to do so), having filed a new "Complaint"/"Charge", "to renew . . . (or) initiate new proceedings", the MDCR issued and served upon Petitioner a purported new "CHARGE" ("No. 2") (SEE: APPENDIX p. 37a-40a) identical to "Charge" No. 1 of April 9, 1980, which had, together with the underlying "Complaint"/"Charge"/claims, been dismissed by the Michigan Court of Appeals.

June 3, 1983–July 12, 1983

King, the MDCR and the EEOC, had a full and fair opportunity to be heard, and directly, or vicariously, to present evidence "on the merits" of the discrimination claim against Petitioner, *if any one of them had simply filed a new "Complaint"/"Charge"*, after the originally-filed "Complaint"/"Charge" had been dismissed, without prejudice. But, NO ONE DID. Further, because of the extensive, inter-relationship between the EEOC and MDCR (SEE: PETITION p. 25-26) the EEOC had the practical opportunity, during the processing of "CHARGE" No. 1, to see to it that it was carried through the completion of the evidentiary hearing without being dismissed for failure to give Petitioner its guaranteed discovery rights.

December 29, 1983

After the MDCR and the Michigan Civil Rights Commission (hereafter MCRC) refused Petitioner's demand to dismiss "CHARGE" No. 2, the matter was again brought before the Ingham County Circuit Court, with a request for the entry of a final Order of Dismissal, this time, *with prejudice.*

May 1, 1985

A Stipulation was filed (signed by counsel for all named parties, i.e., the MDCR, MCRC, the individual members thereof, and their counsel, individually) on behalf of, and with the permission, consent and ap-

proval of King, and the EEOC, "and their successors, representatives and assigns", agreeing to dismiss, *with prejudice*, "CHARGE" No. 2, and:

> "permanently dismiss(ing) and terminat(ing), with prejudice, CHARGE (No. 2); any and all further proceedings related to said "CHARGE", and/or any underlying "Complaint, and/or claims of discrimination by Carol King against . . . (Petitioner) . . . arising out of, or in any way related to, acts that allegedly occurred during the period of on or about December 15, 1976, to January 24, 1977; and, (c) (ordering that they) permanently refrain from reopening (said) Complaint or case
>
> . . .and/or from representing Carol King, in any way, directly or indirectly, in connection with the alleged acts of discrimination referred to therein". (SEE: APPENDIX, p. 41a-42a)

May 3, 1985

Thereafter, the Ingham County Circuit Court, on May 3, 1985, issued its Writ and Order of Superintending Control, (effective, May 13, 1985) which under Michigan law, was a *final* Order of *Dismissal, on the merits.*

"A. Dismissing, with prejudice, the "CHARGE" issued and dated July 12, 1983, in (this) Michigan Civil Rights Commission case . . . related to alleged claims by Carol King, of acts of discrimination by Jack Dykstra Ford, Inc., against Carol King, that allegedly occurred during the period of on or about December 15, 1976 to January 24, 1977.

* * * * * *

B. Permanently dismissing and terminating, with prejudice, all further proceedings relating to said "COMPLAINT" "CHARGE", and/or claims of discrimination against Jack Dykstra Ford, Inc.

* * * * * *

3. . . .(T)his WRIT AND ORDER shall automatically . . . become, constitute and stand as such final Order, by the Civil Rights Commission and Department of Civil Rights, dismissing said "CHARGE", and permanently dismissing and terminating all further proceedings related to said COMPLAINT, "CHARGE" and/or to said claims of discrimination against said Jack Dykstra Ford, Inc., with prejudice." (SEE: APPENDIX, p. 43a-45a)

(a) Despite the EEOC's knowledge of this action by its agent, the MDCR/MCRC, no further action was taken by any of the named parties in that State Court litigation, King, or the EEOC, to appeal that final Order of Dismissal, with prejudice, on the merits, to any Court having jurisdiction to review the same. Under Michigan that Order, dismissing the only "Complaint"/"Charge" ever filed in this matter, with prejudice, operated as a final Order and adjudication of this case "on the merits", binding upon the parties to that litigation, their "successors, representatives and assigns," and their privies.

April 12, 1985 Before the entry of said final Order of Dismissal, on the merits, the EEOC, with full knowledge that such Order was about to be entered, prematurely mailed its first so-called "Determination" letter, dated April 12/17, 1985, to King and Petitioner, which letter was later retracted/"rescinded" by the EEOC (SEE: APPENDIX p. 46a).

April 18, 1985 Because of Petitioner's belief that such "determination" letter must have been mistakenly sent, in light of the dismissal of any and all further proceedings in connection with King's discrimination claim, Petitioner's attorney, on April 18, 1985, spoke, by telephone, with the EEOC's "Regional Attorney",

Charles Taylor, and detailed for him the history of the case and its then-presented posture. This included specific discussion of the fact that the evidentiary hearing had not quite been completed at the time of the first dismissal, without prejudice; but, that the then-imminent second dismissal would nonetheless operate as a *final* dismissal, *on the merits*. The "Regional Attorney" directed that the substance of the phone conversation be submitted in written form to him, with supporting evidence, and that if such information confirmed the discussion, the recently initiated–action of the EEOC would, in accordance with its own Rules, undoubtedly be dismissed, and terminated. (SEE: APPENDIX, p. 76a).

April 19, 1985 The substance of this phone conversation was submitted to the Regional Attorney, in letter form, together with the requested information and materials. (SEE: APPENDIX p. 50a-54a).

May 9, 1985 After receipt of a copy of the confusing "rescinding letter" from the EEOC—which incorrectly (in light of the dismissal of *all proceedings* regarding King's claims of discrimination) referred to a Charge that was still "currently begin pursued by the Michigan Department of Civil Rights"—Petitioner's counsel again wrote the EEOC's Regional

Attorney, again confirming the earlier telephone discussion, and requesting written verification that all further EEOC proceedings were being terminated. (SEE: APPENDIX p. 57a-61a).

June 11, 1985–
July 11, 1985–
September 9, 1985

Thereafter, when no response of any kind was ever received to these letters from Petitioner's attorneys, nor to approximately a dozen phone calls made to Mr. Taylor by Petitioner's attorney, additional letters were sent to him on June 11, 1985, July 11, 1985 and September 9, 1985, attempting to obtain the written confirmation of the earlier assurances of the termination of further proceedings by the EEOC. (SEE: APPENDIX p. 62a-69a). No written, or verbal, response of any kind was ever received by Petitioner, from Mr. Taylor, or anyone on his behalf.

January 24, 1986

The EEOC, mailed its second so-called "Determination" letter, dated January 24, 1986, to King and Petitioner. (SEE: APPENDIX p. 70a-71a) It, too, inaccurately referred to non-existent "findings of the Michigan Department of Civil Rights", all such proceedings having permanently been dismissed and terminated, with prejudice, on the merits; and, no complaint, or valid, official MDCR proceedings of any kind having been on file, or in ex-

	istence, since June 3, 1983, the date of the Michigan Court of Appeals order dismissing and terminating such Complaint, and all such proceedings.
October 8, 1986	Petitioner received, by mail, a copy of the Title VII, "Complaint and Summons", dated September 30, 1986, filed by the EEOC in the U.S. District Court, Eastern District of Michigan, Northern Division. (SEE: APPENDIX p. 72a-75a) On Petitioner's Special Appearance, and Motion to Dismiss or Transfer, because of improper venue, after briefing and hearing, the case was transferred to the Western Judicial District of Michigan, Southern Division.
January 29, 1987	Petitioner Answered said Complaint, denying the claims as untrue, and filed a Motion to Dismiss and/or for Summary Judgment of Dismissal, based upon the preclusive/res judicata effect of the final Order of Dismissal on the merits by the State Court, under the full faith and credit principles of the U.S. CONSTITUTION, as incorporated into 28 USC Sec. 1738, as well as other grounds.
October 2, 1987	The District Court, Judge Robert Holmes Bell, denied this Motion in its Opinion and Order dated October 2, 1987, in which the Court: (a) substituted its own determination—for that of the State—as to whether or

not the State Court Judgment was "on the merits", and held—contrary to state law—that it was *not;* and (b) by implication, held that *even if* the State Court Dismissal was "on the merits", it didn't bar the EEOC, because it was not "in privity" with the earlier proceeding. (SEE: APPENDIX p. 5a-11a).

November 5, 1987

After a Hearing on Petitioner's Motion for Rehearing/Consideration, and to Amend, on November 5, 1987, Judge Bell entered an Order on Rehearing and Reconsideration affirming its October 2, 1987 Order, but with the addition of the language called for by 28 USC Sec. 1292 (b), stating that the Court was of the opinion that its Order involved a controlling question of law as to which there was a substantial ground for difference of opinion, and that an immediate appeal from that Order might materially advance the ultimate termination of the litigation in question. (SEE: APPENDIX p. 4a).

(a) The EEOC opposed the District Court certification of the matter under 28 USC 1292 (b), but did not contest the fact that the question presented to the Court "involves a controlling question of law", and that "an immediate appeal from the Order may materially advance the ultimate termination of the litigation".

November 14, 1987	In timely fashion, Petitioner filed with the U.S. Court of Appeals for the Sixth Circuit, its Petition for Permission to Appeal, under 28 USC 1292 (b). The EEOC filed an untimely response in opposition to Petitioner's Petition to Appeal (with request that such late filing be permitted).
November 29, 1987	The U.S. Court of Appeals denied Petitioner's Petition. (SEE: APPENDIX p. 1a-3a).

No. 87-1610

In the Supreme Court of the United States

OCTOBER TERM, 1987

JACK DYKSTRA FORD, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion when it denied permission for an interlocutory appeal pursuant to 28 U.S.C. (Supp. III) 1292(b).

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BRIEF OF THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals' order denying petitioner's request for permission to appeal under 28 U.S.C. (Supp. III) 1292(b) (Pet. App. 1a-3a) is not reported. The district court's opinion denying petitioner's motion to dismiss or for summary judgment (Pet. App. 5a-11a) is also not reported.

JURISDICTION

The order of the court of appeals was entered on December 28, 1987. The petition for a writ of certiorari was filed on March 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an automobile dealer. In December 1976, Carol King applied to petitioner for a job as a sales

person. Petitioner did not hire King and on February 2, 1977, King filed with the Michigan Department of Civil Rights (MDCR) a complaint alleging sex discrimination. On February 15, 1977, King's complaint was also submitted to the Equal Employment Opportunity Commission (EEOC) as a charge of employment discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*). Pet. App. 5a-6a.

Following an investigation, MDCR found cause to charge petitioner with illegal discrimination under Michigan law, and the matter proceeded to a hearing before a referee in 1980. At the hearing, petitioner sought the testimony of the MDCR official who conducted an effort at conciliation. MDCR claimed that such testimony was privileged and thus refused to allow the official to testify. As a discovery sanction, the referee dismissed the case without prejudice on March 18, 1981; the dismissal was affirmed by a Michigan trial court and the Michigan Court of Appeals. Pet. App. 6a.

On July 12, 1983, MDCR filed a new charge against petitioner. In May 1985, however, MDCR and petitioner stipulated to dismissal of the charge with prejudice because King had not filed a new complaint after the dismissal of the first charge. A Michigan trial court entered the dismissal order pursuant to the stipulation. Pet. App. 6a-7a.

2. After the state proceedings ended, the EEOC began processing King's charge and found reasonable cause to believe that petitioner engaged in sex and race discrimination. Thus the EEOC instituted this action against petitioner under Title VII. On February 2, 1987, petitioner moved to dismiss the action on the ground that the EEOC's claim is barred by the state court order dismissing MDCR's case with prejudice. Pet. App. 7a-8a. The district

court denied petitioner's motion. The court stated that "[s]ince the EEOC and King did not have their claims under 42 U.S.C. § 2000e decided on the merits, res judicata does not bar the present claim" (*id.* at 9a). On reconsideration, the district court amended its opinion to certify its order for immediate appeal pursuant to 28 U.S.C. (Supp. III) 1292(b) (Pet. App. 4a).

Petitioner then filed, pursuant to Fed. R. App. P. 5, a petition for permission to appeal from the district court's interlocutory order. The court of appeals, however, denied permission for an immediate appeal. The court declared: "Upon consideration of the petition and response, the Court concludes that interlocutory review under 28 U.S.C. § 1292(b) is not appropriate" (Pet. App. 3a).

ARGUMENT

The Court has authority to review "[c]ases in the courts of appeals" (28 U.S.C. 1254). Accordingly, the Court has no authority to review matters that were not within the jurisdiction of the court of appeals. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-743 (1982). Here, the only matter properly "in the court[] of appeals" was whether that court would permit an interlocutory appeal under 28 U.S.C. (Supp. III) 1292(b). Thus, the issue presented by petitioner—whether the EEOC's action is barred by 28 U.S.C. 1738 and Michigan's doctrine of res judicata—is not properly before this Court.

Section 1292(b) states that the court of appeals "may * * * in its discretion, permit" an appeal of an order certified for immediate appeal by the district court. The Senate committee report accompanying this provision makes it clear that the appellate court "may refuse to entertain such an appeal in much the same manner that the

Supreme Court today refuses to entertain applications for writs of certiorari." S. Rep. 2434, 85th Cong., 2d Sess. 3 (1958). It further states (*ibid.* (emphasis added)) that

> the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. * * * It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, *whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.*

Accord *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 173 n.50 (1972).

In this case, the court of appeals did not abuse its discretion in denying petitioner's request for an immediate appeal. Indeed, petitioner contends that the district court's decision is "clearly erroneous" (Pet. 6); but petitioner never asserts, let alone demonstrates, that the court of appeals' decision not to permit an appeal was an abuse of discretion.* Thus, the only order currently subject to this Court's review is not even challenged.

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* In fact, the district court's decison is not "clearly erroneous." Under 28 U.S.C. 1738, a federal court must give the same preclusive effect to a state court judgment as would be accorded in the court which entered the judgment. *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 462-463 (1982). But petitioner cites no Michigan authority for the proposition that the EEOC is barred from bringing this action by the dismissal of MDCR's prior action, in which the EEOC was not a party and which did not involve a Title VII claim. Further, unlike the situation in *Kremer*, where this Court found pursuit of a Title VII claim precluded by a state court judgment that the plaintiff had not been the victim of discrimination, in this case the state court dismissal looked not to the merits but was imposed as a discovery sanction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

CHARLES A. SHANOR
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Equal Employment
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MAY 1988

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No. 87-1610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JACK DYKSTRA FORD, INCORPORATED,
Petitioner,

VS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITIONER'S REPLY BRIEF

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June 1, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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ARGUMENTS FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

In its Brief, Respondent does not respond to the "Questions Presented" in Petitioner's Petition, and thus leaves unanswered Petitioner's arguments and legal authorities cited with regard to those substantive legal issues dispositive of this case.

Respondent submits that the only question before the Court is whether or not the Court of Appeals "*abused its discretion*" when it denied permission for an interlocutory appeal pursuant to 28 USC Sec. 1292 (b). Accepting, for purposes of this Reply Brief, that this *is* the sole issue, Petitioner's response to Respondent's claim that "Petitioner never asserts, let alone demonstrates, that the Court of Appeals' Decision not to permit an appeal was an abuse of discretion", is as follows.

ARGUMENT

If an adversary's arguments on the substantive, dispositve legal issues before the Court are telling, extremely troublesome, and essentially unanswerable, it is often best to ignore them, and argue something else, in the *hope* that—since they can't be effectively counter-acted—the Court will ignore them too. Respondent's cavalier treatment of the basic legal issue before the Court, by putting its sole, factually and legally unsupported, short-shrift reference to it, in a footnote at the very end of its Brief, is a classic example of this technique, to attempt to ignore into non-existence an issue which it knows it cannot win. In that footnote, Respondent failed to deal with the undisputed *fact* that, since the EEOC was "*in privity*" with the MDCR, the "Full Faith and Credit Act" (28 USC Sec. 1738), [as interpreted by this Court in: *Kremer v Chemical Construction Corp.*, 456 US 461 (1982) (pages 113a-114a,

Petition); the Michigan cases and other legal authorities cited at pages 10, 22-23, Petition; and, by the EEOC's own binding Rule expressly prohibiting the suit in question (Appendix Item #24, page 76a, Petition)], required the dismissal of the Complaint giving rise to this cause, pursuant to Petitioner's Motion seeking such dismissal.

Viewed realistically, Respondent's silence in this regard is tantamount to a concession by Respondent on the important Federal question involved, which constitutes the gross miscarriage of justice in this significant, heavily-trafficked area of the Federal law dealing with anti-job discrimination, that renders the refusal of the Court of Appeals to "hear the case", correct the injustice done, and give necessary, clear guidance to trial bench and bar, *a clear abuse of its discretion.*

Of course Petitioner claims that the Court of Appeals committed a gross abuse of its discretion; and, for Respondent to take the position that such a challenge is not made in the Petition before this Court is to "strain out the gnat, and swallow the camel". The reason that the Decision of the Court of Appeals, refusing to grant the appeal, is "clearly erroneous", is that such denial constituted a clear "abuse of (clearly erroneous use of its) discretion". Respondent's contention that the Petition has not challenged the Court of Appeals' Order, as constituting an abuse of its discretion, simply founders on the facts, and any fair and honest reading of the Petition (especially pages 26-28), since the entire Petition subsumes the claim that the Court of Appeals abused its discretion for all of the reasons set forth in the Petition.

Without so much as a single suggestion as to what the accepted *criteria* are for deciding whether or not a Court of Appeals has abused its discretion in such a case, Respondent simply states that—in its perhaps somewhat self-interested opinion—no such abuse occurred. "Discretion" in this context, as in most others, does not give a

court the "unbridled license to do as it pleases", so that whatever it does is, *ipso facto*, not an "abuse of discretion". The term "discretion" means:

> "... a 'sound judicial discretion' ". *Brookdale Cemetery Ass'n v Lewis*, 342 Mich 14, 18; 69 NW 2d 176 (1955)
>
> * * *
>
> "... 'sound discretion ... means in good faith and upon reasonable grounds' ". *People v Raider*, 256 Mich 131; 239 NW 387 (1931)

Therefore, there must be recognized criteria, against which to measure a court's exercise of discretion, to determine whether or not it is sound, judicial judgment, based upon facts, in compliance with consistently-applied legal principles, and not merely arbitrary, whimsical and capricious.

Respondent alludes to no such criteria, but uses its opinion, approving what the Court of Appeals did, as the ultimate measure of whether or not an abuse of discretion occurred. On the other hand, in the specific factors set forth in the "Conclusion" portion of its Petition (pages 26-28, Petition) Petitioner referred to the various criteria articulated in other Decisions of this Court, as to the kind of case, where a gross miscarriage of justice has occurred, and the issues involved are of such significant national concern, that this Court will act, by either deciding those issues itself, or by directing the Court of Appeals to hear the case and decide such issues. This case is an appropriate vehicle for determining what the law should be in this extremely important area. The particular issue is ripe for review, without regard to any factual presentation that might be developed in the trial court. And, it is clear that the EEOC, and Courts of Appeals, need the guiding light of the Supreme Court—not merely to resolve the unfairness here—to correct the unfairness that is likely to be repeated in other cases, since the EEOC feels itself totally

free to ignore its own Rule, the Federal Full Faith and Credit Act and the Decision in *Kremer*, supra.

The criteria that this Court has referred to in other cases, to determine such abuse of discretion issue, may fairly be listed in the following manner, as applied to the specific facts of this case.

1. A gross unfairness and miscarriage of justice, has occurred:

A. If Petitioner has to go to the tremendous additional financial burden to proceed to trial, that Petitioner's uncontradicted Affidavit shows is likely to bankrupt the corporation (Appendix Item #25, pages 78a-81a, Petition);

B. And, has to proceed to a trial over ten years after-the-fact, with key witnesses gone, and gaps in the memories of those witnesses who are still available, thus rendering Petitioner incapable of effectively defending itself, after other trial, and appellate courts have, on three separate occasions, *dismissed the claim*, here resurrected for yet a fourth attack upon Petitioner.

2. There is a single, clear, legal issue, which is dispositive of the case, that involves the interpretation and application of a Federal statute of constitutional derivation, which has already been interpreted and applied by the Supreme Court, in *Kremer*, supra., but which the EEOC, the Federal District Court, and the Court of Appeals felt free to ignore in this case.

3. The interpretation and application of this Federal statute arises in an important area of employment discrimination law where broad national policy needs to be clearly established and defined.

4. Where Federal trial courts, courts of appeals, and this court, are repeatedly involved, on almost a daily basis, to determine under what circumstances the termination, by dismissal, of an earlier, identical job discrimination claim in state court, is a bar to a later action in a Federal court.

5. Despite the guidance of the Court in *Kremer*, supra., apparently the Federal Agency charged with pursuing Federal job discrimination claims, and the lower courts, need an even clearer statement of the rule, so as to substantially reduce such suits in Federal District Court, and their appearances, in various appeals, in front of the Federal Courts of Appeal, and this Court.

The two cases cited by Respondent in its Brief, do not support it's position, and, in fact, furnish good authority for *granting* the Petition now before this Court. The Decision in *Tidewater Oil Co. v United States*, 409 US 151 (1972), is not at all relevant to the facts and circumstances of this case, since the decision of the Court of Appeals there, on the interlocutory order in question, which the Court of Appeals denied a Petition for permission to appeal from:

> ". . . would essentially be only an *advisory opinion* to the district court since the issue would usually be open to relitigation on appeal of the final judgment to this Court. The net result would be added work for the courts of appeals, with no assurance that there would ultimately be saving of district court time.
>
> Hence, we conclude that Sec. 1292 (b) did not establish jurisdiction in the Court of Appeals over interlocutory orders in Expediting Act cases. The exclusive nature of the juridiction created in Section 2 of the Expediting Act has consistently been recognized by this court, and we hold today that that exclusivity remains unimpaired." ID, pp 173-174.

In this case, the lower court clearly *had* jurisdiction.

The footnote, 50, to which Respondent refers merely notes the discretion of the Court of Appeals, with regard to a Petition under Sec. 1292 (b); and, refers to the fact

that, since the granting of such an appeal in the kind of case in question there would not "materially advance the ultimate termination of the litigation"—since it would only be an "advisory opinion" for a later appeal directly to the Supreme Court—to use such discretion to grant such appeals in that kind of case, would only cause added work for the courts, without any benefit to anyone resulting therefrom. Nothing could be further removed from the facts and circumstances of the case at bar, where a decision by the Court of Appeals on the issue presented would be ultimately dispositive of the case, and end the litigaiton once and for all.

The reasons expressed by this Court in the *Tidewater Oil* case, supra., for approving the discretionary denial there, give rise to the strong implication that *if* those circumstances were different—as they so strikingly are here—a different result might very well have obtained there. This case presents the starkly opposite picture, i.e., where an important Federal question is involved, of great national significance, in a type of case repeatedly brought before this Court, and where clear guidance now given should not only correct the injustice in this case, but substantially reduce the flood of cases of this sort that are being improperly filed, and then brought, on appeal, before the courts of appeals, and this Court. [It is interesting to note that the very next footnote appearing in the *Tidewater Oil* case, supra., is one where Justice Douglas quotes Mr. Chief Justice Hughes, who was wont to say, "Footnotes do not really count".]

In *Nixon v Fitzgerald*, 457 US 731 (1982), we find support for a finding that the Court of Appeals here was guilty of an abuse of discretion, and for directing it to proceed with a fully reasoned disposition of the issue raised on appeal. In *Nixon*, supra., this Court ruled that there was a "[c]ase in the court of appeals", even though the Court of Appeals had summarily dismissed the appeal to it from the District Court. In doing so, the Court relied

upon the "collateral order" doctrine of *Cohen v Beneficial Industrial Loan Corp.*, 337 US 541 (1949). Respondent contends that "since the only issue" presented is whether the Court of Appeals abused its discretion in refusing to permit the appeal requested here, that the underlying issue as to whether the EEOC's action is barred, may not properly be considered by this Court. It is ingenuous, to say the least, to argue that it is beyond the jurisdiction of this Court to look to the underlying legal issue, which the Court of Appeals would have dealt with, had it granted the Request for Permission to Appeal. This Court obviously has the jurisdiction, and authority, to look at the *entire case* to determine whether or not there has been such a clear violation of law in the District Court, that the Court of Appeals refusal to correct such clearly-erroneous Decision, causing a gross injustice, constitutes an abuse of discretion, under the criteria referred to above. This Court does not look at such a case in a factual and legal vacuum, nor, it is assumed, without regard to the matter of justice being done, by simply directing the Court of Appeals to grant the appeal and correct the error.

The very kind of injustice that the *Cohen* case, supra., held justified the granting of an appeal by the Court of Appeals, is very similar to that which confronts the Court here. There, the Court dealt with the requirement, in a state statute, that Plaintiff give security in order to pursue a particular type of litigation. The Federal District Court there determined that the statute did not apply, and did not require such security. The Court concluded that to wait for a final decision in the case would:

> ". . . be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."
> ID, p 546

In the case at hand, we have a similar practical reality, as referred to above, which is certainly no less worthy of consideration than that which motivated the Court there, and in the *Nixon* case, supra., to find that the Petition should be granted.

The kind of irreparable harm that will occur to Petitioner here, if not corrected, is no different from the kind involved in *Cohen*, supra., referred to there as:

> "important issue(s) completely separate from the merits of the action, and . . . effectively unreviewable on appeal from a final judgment."
> *Nixon*, supra., page 742.

CONCLUSION

What Petitioner asks is simply that this Court direct the Court of Appeals to listen to Petitioner's appeal *NOW*, to deal with this constantly recurring issue, in this significant area of Federal anti-employment discrimination law, so as to save potential future Defendants, and the Courts, from essentially frivolous suits, which are barred by prior final state court adjudications. Such action by the Court of Appeals, at this time, will also see to it that justice is done in this case, a matter which Petitioner assumes is still what courts of justice are all about.

The recognized criteria have been met, and disclose an abuse of discretion, that only the action of this Court, by granting this Petition, can correct.

Petitioner respectfully submits that the denial of its Petition would constitute the *extreme use* of an administrative policy, and procedural device to limit the work of the Court.

> "Extreme law is often extreme injustice".
> *Publius Terentius Afer*

> "[The] claimed right to 'sue til something gives' cannot be sound law. There must be an end of

> litigation, and out of shere self-defense in consideration of broad public policy our courts cannot gladly permit repeated litigation of the same old question under the circumstances appearing in this case."
> *Knowlton v City of Port Huron*, 355 Mich 448, 456; 95 NW 2d, 824 (1959)

To deny this Petition, in light of the clear error, and resulting injustice, would be to allow the Plaintiff, despite its privity, and identity of interest, with the MDCR, to "sue til something gives", i.e., Petitioner. The claim is barred. The EEOC had no right to file this action. To permit such clearly unlawful litigation to continue, merely to limit the work of the Court, cannot be sound law, and it certainly is not justice.

Petitioner respectfully requests that the Court grant the Petition,and direct the Court of Appeals to *GRANT* the *APPEAL*, and follow the mandate of *Kremer*, supra., by the dismissal, with appropriate sanctions, of this legally-barred action.

CARR, STREET & GRUA

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Dated: This 1st day of June, A.D., 1988.